THE ROLE OF ADOPTION IN WINNING PUBLIC RECOGNITION FOR ADULT PARTNERSHIPS

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INTRODUCTION

Adoption stands beside marriage as the most public of family institutions. It confers the imprimatur of the state on the transfer of parenthood from one legal parent to another.[1] It does so in the name of protecting children's interests.[2] As Rickie Sollinger's history of adoption suggests, however, it also does so in ways that reinforce dominant norms and understandings of family regularity.[3] Precisely because adoption confers state approval, and does so publicly with the full force of the law behind it, it carries societal symbolism that extends well beyond its impact on any individual family.

The creation of family, which is publicly celebrated through marriage and adoption, is also among the most private of matters. Shared intimacy stands as the foundation of family bonds.[4] That intimacy, whether sexual

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[1] *See, e.g.*, 2 HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 21.1, at 565 (2d ed. 1987) (defining adoption as "the legal process by which a child acquires parents other than his natural parents and parents acquire a child other than a natural child"); OHIO REV. CODE ANN. § 3107.15(A)(1) (West 2005) (providing that an adoption decree terminates the relationship between the adopted person and the adopted person's biological parents "[e]xcept with respect to a spouse of the [biological parent] and relatives of the [biological parent]").

[2] *See* RICKIE SOLINGER, WAKE UP LITTLE SUSIE: SINGLE PREGNANCY AND RACE BEFORE *ROE V. WADE* 168 (1994) (discussing the government's increased role in monitoring adoption in the 1950s).

[3] *See id.* at 32 ("[T]here was an implied concern with keeping white women free of the taint of economic, market-driven involvement.").

[4] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 574 (2003) ("These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.") (quoting Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 851 (1992)).

or emotional, carries with it dependence and vulnerability.[5] The vulnerability of an improvidently pregnant mother and her newborn has long been a concern of adoption policy; less so the vulnerability of those who seek recognition as parents and face rejection.[6] Precisely because the creation of family involves the deepest of emotional bonds, public celebration can occur only in circumstances that reaffirm private security and well-being.

This combination of public approval and private vulnerability has to date limited the role of adoption in assisted reproduction. Public recognition, with its symbolic embrace of the underlying practices, is too risky a venture for the controversial and the experimental.[7] Intimate bonds, whether those between parents and child or partner to partner, need to be forged far from the glare of public scrutiny. Those who would create new families seek public sanction only when the outcome is certain, or the alternatives unsatisfying. Prospective parents turning to assisted reproduction have enjoyed too many ways to secure to secure the families of their choice without risking public disapproval or officious intrusion.[8] Adoption has therefore been largely irrelevant to the process.

I predict, however, that the relationship between adoption and assisted reproduction is about to change. While the relationship between parent and newborn is always fragile, the relationship between intimate adults is another matter. They can pick and choose when to seek public recognition

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[5] See, in particular, MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 8–9 (1995) (arguing that dependence is a an inevitable part of family life, and that neither the dependent nor their caregivers should be disadvantaged because of it).

[6] *See* Susan Frelich Appleton, *Adoption in the Age of Reproductive Technology*, 2004 U. CHI. LEGAL F. 393, 428–31 (recounting pain and feelings of powerlessness of infertile couples in the face of adoption procedures that allow choice (and therefore rejection) of prospective parents).

[7] For a thorough examination of the controversies surrounding even "low-tech" means of assisted reproduction for infertile married couples, see Gaia Bernstein, *The Socio-Legal Acceptance of New Technologies: A Close Look at Artificial Insemination*, 77 WASH. L. REV. 1035, 1037 (2002) (describing artificial insemination as an innovation involving "dark secrets" and "shame").

[8] This is true in part because even though the improvidently pregnant tend to be among the poorest and most vulnerable of prospective parents, those who resort to assisted reproduction are often among the most sophisticated and wealthy. *See* MADELYN FREUNDLICH, 4 ADOPTION AND ETHICS 50, 52 (2001) (stating that the cost of adopting a healthy child ranges from $10,000 to $20,000, but the total cost of a live birth from in vitro fertilization ranges anywhere from $40,000 to over $100,000).

and use private agreements to govern a large part of their relationships.[9] Moreover, whereas marriage once served as the mandatory and exclusive avenue for recognition of parental partners, it is no longer.[10] With increasing numbers of unmarried households,[11] adoption offers an alternative to marriage for those otherwise unable to secure public recognition of their relationships. The new frontier for adoption may accordingly be recognition, not of parent-child ties, but of the partnership bonds that constitute an important part of the child's experience of family.

To explore the role of adoption in winning public recognition for adult partnerships, I will approach adoption as a consumer institution, the product of which is official state sanction.[12] In doing so, I will bracket the wisdom of the likely developments in order to focus on the logic of the niche they are likely to occupy. I will argue that adoption, like any other consumer institution, requires willing sellers and eager buyers able to agree on shared terms. Many focus on the role of adoption in identifying which parents the states *should* recognize and accordingly acknowledge that adoption is irrelevant for those parental relationships the state will not countenance.[13] But the significance of adoption also disappears if biological parents do not use adoption to transfer custody of their children, or prospective parents acquire and raise children without state sanction.[14] Adoption will therefore contribute most to assisted reproduction in those arenas where the state is willing to confer approval on prospective parents, the approval itself confers benefits not otherwise available, and the terms are not so onerous as to encourage the participants to look elsewhere for recognition.

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[9] Of course, the one thing contract cannot address is the relationship of a parental partner to a child, especially when the relationships ends. *See* discussion *infra* Part III.

[10] For a full account of these changes, see JUNE CARBONE, FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW (2000).

[11] Eric Schmitt, *For First Time, Nuclear Families Drop Below 25% of Households*, N.Y. TIMES, May 15, 2001, at A1.

[12] *See* Lynn D. Wardle, *A Critical Analysis of Interstate Recognition of Lesbigay Adoptions*, 3 AVE MARIA L. REV. 561, 590–91 (2005).

[13] *See, e.g.*, Madeline Marzano-Lesnevich & Galit Moskowitz, *In the Interest of Children of Same-Sex Couples*, 19 J. AM. ACAD. MATRIMONIAL L. 255, 262 (2005).

[14] It is difficult to believe, for example, that the state will take children away from the only parents they have ever known because the parents did not comply with the formalities of adoption in cases in which all of the potential parents agreed to the arrangements at the time of the child's birth. *See, e.g.*, Doe v. Doe, 710 A.2d 1297, 1302 (Conn. 1998), *overruled in part by In re* Joshua S., 796 A.2d 1141 (Conn. 2002).

In considering the contribution of adoption to the determination of parentage in the context of assisted reproduction, this Article will first attempt to place adoption within the framework of our understanding of public and private spheres. The idea of family privacy is of relatively recent vintage.[15] I will argue that while conceptions of familial privacy once distinguished between sanctioned and illicit relationships, today those ideas of family privacy may also extend to a third category of permissible bonds that carry with them neither state approval nor condemnation.[16] This increased space for the creation of families of choice frames the role adoption is likely to play as one of a number of competing paths to recognition of parental status. Second, I will examine how assisted reproductive practices have developed from experimentation, to treatment for infertility, to the construction of families of choice, and how the changing role of assisted reproduction produces new challenges for the determination of parenthood. Third, I will describe the circumstances in which the state has historically intervened to supervise and sanction adoption. The role of adoption operates in tandem with the background law of parentage. Adoption succeeds in transferring recognition from one legal parent to another; it is less well designed to resolve uncertainty about who is a parent in the first place. Fourth, I will ask when and whether prospective parents are likely to want the sanction of the state that comes with adoption.

Finally, this Article concludes that adoption is most likely to be employed in the context of assisted reproduction, not to protect the interests of the child, but to secure recognition of otherwise unsanctioned adult relationships. In a polarized era of family values, the seemingly neutral arena of adoption may offer the best prospects for legal recognition of controversial relationships. The irony is that the most public of practices is most likely to be employed where its principal purpose is to advance the autonomy of adults, and to secure an otherwise unavailable zone of privacy.

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[15] *See* Martha Albertson Fineman, *What Place for Family Privacy?*, 67 GEO. WASH. L. REV 1207, 1207–08 (1999) (indicating that the view of family as a private sphere separate from the public did not become prevalent until the nineteenth century).

[16] For cases developing the Supreme Court's privacy jurisprudence, see generally *Lawrence v. Texas*, 539 U.S. 558 (2003); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Griswold v. Connecticut*, 381 U.S. 479 (1965); and discussion *infra* notes 63–70, tracing the evolving conceptions of privacy.

I. FAMILY PRIVACY: AUTONOMY OR SANCTION?

The idea of family privacy has long had two, subtly different meanings, with dramatically different consequences for family law. Both treat intimate relationships as a protected arena. One, however, identifies family privacy with sanctioned relationships to establish a privileged sphere.[17] Privacy in this context, which is ordinarily associated with married heterosexual relationships, accords presumptive legitimacy to the actions taken within the "sanctity" of marriage.[18] The result, I have argued elsewhere, is an ex ante system of regulation that addresses issues like parentage within the parameters of authorized transactions, such as marriage or adoption.[19] The other meaning of privacy suggests a right to be free from intrusion without necessarily implying approval or recognition.[20] Without advance approval, however, this produces an ex post system of family law; the legal determination of issues such as parentage remain uncertain until a dispute arises, and then are resolved on the basis of the facts.[21] These differing meanings of privacy frame the likely evolution of parentage decisions in the context of assisted reproduction, and they underlie the Supreme Court analysis of the constitutional framework underlying state regulation.

Martha Fineman emphasizes that family privacy of any kind is a relatively recent construct.[22] The historian Philippe Ariès, for example, responded to the observation that the King of France was never alone by pointing out that no one in that era was ever alone.[23] Households included servants, and homes were built without hallways so that the passage from

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[17] *See* Fineman, *supra* note 15, at 1213.

[18] *See* Katharine K. Baker, *Bargaining or Biology?: The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL'Y 1, 24 (2004).

[19] *See* June Carbone, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 LA. L. REV. 1295, 1300–04 (2005).

[20] *See* Fineman, *supra* note 15, at 1213.

[21] *See, e.g.*, Elisa B. v. Superior Court, 117 P.3d 660, 662 (Cal. 2005) (considering the child support obligations of a woman who had supported her partner's artificial insemination and had agreed to raise the children with her partner).

[22] *See* Fineman, *supra* note 15, at 1207–08. Fineman maintains that the notion of the "separate spheres," which became popular in the nineteenth century, involved a "metaphor of separation [that] captured an ethic or ideology of family privacy in which state intervention was the exception." *Id.*

[23] PHILIPPE ARIÈS, CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE 398 (1962).

one part of the house often went through the bedrooms.[24] English communities tied grazing rights to appropriate behavior, and French neighbors intervened to prevent drunken husbands from too badly beating their wives.[25] In the small towns and villages that characterized early modern Europe, the idea of separation from relatives, neighbors, and village elders did not exist.[26]

Fineman associated the idea of family privacy with the ideology of separate spheres.[27] As the financial base of the urban middle class changed from farms and crafts to the professions and executive ranks, men and productive activity moved from the home into the market.[28] Nuclear families became more important than extended families, formal education produced greater payoffs for men, and women (both as mothers and as prospective brides) assumed greater responsibility as the moral guardians who policed sexuality until better-educated men were ready for marriage to well-raised virgins.[29] As these changes took hold, the nuclear family home became a sacred space, free from the pressures of the market and the intrusion of relatives, friends, and state.[30] It became associated with distinctive values and roles, and the actions taking place within it were entitled to deference.[31] Recognition of such a sphere, as Fineman reminds

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[24] JUNE CARBONE, FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW 124 (2000).

[25] *Id.*

[26] *See id.* at 62–63.

[27] Fineman, *supra* note 15, at 1207. The "separate spheres" is a phrase used to describe the redefinition of the values of the home in opposition to those of the market. *Id.* The redefinition came in the U.S. as industrialization moved men and productive activities out of the home, and recharacterized women's roles in terms of more independent responsibility for child-rearing and for promotion of the virtues associated with fidelity, purity, honesty, and warmth. *See* CARBONE, *supra* note 24, at 62–66. For a revisionist historical approach disputing the conventional account of the separate spheres, see generally Linda K. Kerber, *Separate Spheres, Female Worlds, Woman's Place: The Rhetoric of Women's History*, 75 J. AM. HIST. 9 (1988).

[28] *See* CARBONE, *supra* note 24, at 62–66, 124; *see also* Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1498–1500 (1983).

[29] *See* CARBONE, *supra* note 24. During the first half of the 19th century, the percentage of brides pregnant at the altar dropped from about one-third to ten percent as betrothal no longer signaled the beginning of sexual activity. LINDA R. HIRSHMAN & JANE E. LARSON, HARD BARGAINS: THE POLITICS OF SEX 92 (1998).

[30] *See* CARBONE, *supra* note 24.

[31] *Id.* at 124–26.

us, involved not only a right to be free from intrusion, but a right to invoke societal support.[32] It also involved a classic ex ante model: entrance into marriage signaled acceptance (and expected internalization) of well-defined responsibilities accompanying a privileged status.

Justice Scalia's plurality opinion in *Michael H. v. Gerald D.*[33] reflects this conception of marital privacy. The case involved the marital presumption.[34] Michael, the biological father, had an affair with Carole, an international model who was married to Gerald, a French oil company executive.[35] After their daughter Victoria was born, Michael and Carole lived together for three months in Jamaica and eight months in California.[36] Michael held out Victoria as his own and Carole regarded him as Victoria's father, and blood tests established a strong likelihood that Victoria was his.[37] Nonetheless, when Carole moved to New York with Gerald after the child turned three, the trial court invoked the marital presumption and refused to recognize Michael as the father or to permit visitation.[38]

The Supreme Court's plurality opinion, which upheld the refusal to recognize Michael's standing to seek visitation, turned on what Scalia described as "the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family."[39] He concluded, "[O]ur traditions have protected the marital family (Gerald, Carole, and the child they acknowledge to be theirs) against the sort of claim Michael asserts."[40] Within this tradition, marriage creates a privileged status that protects the union of Gerald, Carole, "and the child they acknowledge to be theirs"[41] from the intrusion, not so much of the state, but of the biological father.[42] Biology is

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[32] *See* Fineman, *supra* note 15, at 1208–09.

[33] 491 U.S. 110 (1989).

[34] *See id.* at 113.

[35] *Id.*

[36] *Id.* at 114.

[37] *Id.*

[38] *Id.* at 115.

[39] *Id.* at 123.

[40] *Id.* at 124.

[41] *Id.* at 129.

[42] *See id.* Of course, as a practical matter, the case involved Michael's efforts to invoke the power of the state to compel Carole to allow him to continue his relationship with the child. *See generally id.* Given the fact that Carole had given birth and was indubitably the mother, and Gerald enjoyed parental status by virtue of the marriage and of his name on the

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irrelevant to the outcome. So are intent and the existence of an emotional and functional bond between the biological father and his child.[43] What appears to matter to the court, at least in the case of a dispute, is state sanction of the marital union as a protected locus for childbearing.[44] For Justice Scalia, if not necessarily the other justices, the facts on the ground, including Victoria's relationship to Michael, have no legal relevance because of their illicit origin.[45]

Troxel v. Granville,[46] decided eleven years after *Michael H.*, continued to recognize traditional family relationships as protected, without necessarily tying the protection to marriage. In *Troxel*, Washington had enacted an open-ended visitation statute, which granted Washington courts broad discretion to grant standing to any interested adult to seek visitation.[47] The most common cases have involved grandparents, and at the time of the decision, virtually every state had a statute permitting grandparents, the best organized and funded lobby in family law, to seek visitation, often over the custodial parents' objection.[48]

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birth certificate, Michael could obtain access to Victoria only if he gained recognition as a parent. *See id.* at 113–15. Even though Stevens' opinion, which concurred in the result, turned on a reading of the California visitation statute as allowing Michael standing to seek visitation without parental status, *see id.* at 132 (Stevens, J., concurring), California courts have not followed such an interpretation, and the Supreme Court's later decision in *Troxel v. Granville*, 530 U.S. 57 (2000), called into question the constitutionality of such a construction.

[43] *Michael H.*, 491 U.S. at 131 (majority opinion). However, I argued elsewhere that the facts at the time the case was filed, which was shortly after Carole severed her relationship with Michael, and those at the time of the Supreme Court decision five years later (and after the child moved to New York with Gerald and Carole and the birth of two additional children into the marital family) may help explain the decision. *See* June Carbone & Naomi Cahn, *Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty*, 11 WM. & MARY BILL RTS. J. 1011, 1045 (2003).

[44] *Michael H.*, 491 U.S. at 124. Brennan's dissent, in contrast, would have found that when Michael and Carole lived together and recognized Victoria as theirs, they established a family thereby entitling Michael to "a constitutionally protected stake in his relationship with Victoria." *Id.* at 144 (Brennan, J., dissenting).

[45] *Id.* at 124–30 (majority opinion).

[46] 530 U.S. 57 (2000).

[47] *Id.* at 60. Michael H., as an interested adult, would have qualified under Washington's rule.

[48] *Id.* at 73. The *Troxel* case involved a child whose father had committed suicide, and the paternal grandparents wanted continued contact with the child. *Id.* at 60. After the mother remarried, she and the grandparents quarreled over the terms of visitation, and the

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The Washington Supreme Court declared the statute unconstitutional on its face, concluding that the U.S. Constitution did not permit such an interference with the rights of an otherwise fit parent absent a showing of harm or potential harm to the child.[49] The decision, if allowed to stand, would have underscored the continued importance of deference to ex ante family determinations. Instead, the *Troxel* Court fractured at least as badly as the Court that decided *Michael H.*[50] Justice O'Connor's plurality opinion did not declare the statute per se unconstitutional, but rather, held that the statute was unconstitutional as applied to Granville because the trial court failed to grant any deference to the child-rearing decisions of a fit parent, which infringed upon the mother's constitutional rights.[51] Three justices joined Justice O'Connor.[52] Justices Souter and Thomas, who concurred in the result, would have granted parents more sweeping constitutional protection.[53] The three dissenting Justices would have left more room for state intervention.[54] Overall, six Justices recognized at least some constitutional protection for parents in custody or visitation disputes with nonparents.[55]

Read together, *Michael H.* and *Troxel* continue to afford a constitutionally mandated measure of deference to family decisionmaking,[56] but they do not address the definition of family within

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trial court sided with the grandparents to provide more extensive visitation than the mother would have permitted. *Id.* at 60–61. The trial court decision rested on a classic ex post determination of the child's interests as it found them at the time of the decision, that is, in the context of the child's close relationship with the grandparents that had developed over time. *Id.* at 61–62.

[49] *Id.* at 73.

[50] *Id.* at 60, 75; *Michael H.*, 491 U.S. at 112.

[51] *Troxel*, 530 U.S. at 72–73.

[52] *Id.* at 60.

[53] *Id.* at 79 (Souter, J., concurring), 80 (Thomas, J., concurring). Souter would have affirmed the Supreme Court of Washington's decision, which held that the statute was unconstitutional on its face. *Id.* at 79 (Souter, J., concurring). Thomas would have applied strict scrutiny and struck down the statute, claiming that the state did not have a legitimate interest, let alone a compelling interest, in interfering with a fit parent's fundamental right to raise her children. *Id.* at 80 (Thomas, J., concurring).

[54] *See id.* at 80–91 (Stevens, J., dissenting), 91–93 (Scalia, J., dissenting), 93–102 (Kennedy, J., dissenting).

[55] *See id.* at 60 (majority opinion), 75 (Souter, J., concurring), 80 (Thomas, J., concurring).

[56] *Compare* Michael H. v. Gerald D., 491 U.S. 110 (1989) (rejecting the claim by a putative natural father of the right to visit his child conceived by a married woman), *with*

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the protected sphere. If, for example, Washington adopted a broad functional definition of parental status that included all of those who had established a parent-like relationship with the child, could it then recognize the grandparents as "parents" and avoid constitutional scrutiny? Or do the constitutional rights extended to parents require a constitutional definition of parenthood? Although *Troxel* appears to reject a too open-ended model of ex post decisionmaking, it does not resolve the question of whether parentage itself needs to be a fixed or inflexible category.[57]

Lawrence v. Texas,[58] decided three years after *Troxel*, illustrated the other meaning of privacy. The case involved a constitutional challenge to Texas laws that banned same-sex sodomy.[59] As the Court noted, the original prohibitions of sodomy did not distinguish between heterosexual and homosexual sodomy or between married or unmarried couples.[60] Rather, the Court concluded, "[E]arly American sodomy laws were not directed at homosexuals as such but instead sought to prohibit nonprocreative sexual activity more generally."[61] In a society that did not hesitate to regulate sexuality in the name of public morality, marriage authorized sexual relations for purposes of procreation; it did not insulate married couples from regulation of sexual affairs.[62]

Troxel, 530 U.S. 57 (refusing to apply a state statute that would allow "any person" to petition for the right to visit a child regardless of the parent's wishes).

[57] The Supreme Court responded to the divisions in *Michael H.* by departing the field and leaving the continuing role, if any, to be accorded the marital presumption to the states. The Court appeared to have no greater eagerness to revisit the family questions left open in *Troxel*. *Compare* Emily Buss, *"Parental" Rights*, 88 VA. L. REV. 635, 667–68 (2002) (interpreting *Troxel* as permitting the states to recognize whomever they choose as parents, but requiring them to accord protection to those they recognize), *with* David D. Meyer, *Lochner Redeemed: Family Privacy After Troxel and Carhart*, 48 UCLA L. REV. 1125, 1141–55 (2001) (arguing that states are not completely free to rewrite the laws of parenthood, but are not required to grant rigid deference to those who receive parental standing).

[58] 539 U.S. 558 (2003).

[59] *Id.* at 563.

[60] *Id.* at 568–69.

[61] *Id.*

[62] To the extent that the law recognized marital privacy in this context, it did so not as a matter of constitutional right, but in terms of practical limitations that kept sodomy between married couples out of the courts. *See id.* at 569. The prosecutors generally chose not to prosecute private acts between consenting adults, and the law treated the testimony of a consenting adult partner as the testimony of an accomplice, and therefore inadmissible. *Id.* ("Under then-prevailing standards, a man could not be convicted of sodomy upon testimony

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The first recognition of a constitutional right of privacy to be left alone, as opposed to sanction for protected activity, came in *Griswold v. Connecticut*.[63] In *Griswold*, which involved a married couple's right to contraception, the Court combined the notion of marriage as a protected sphere with protection of intimacy and an individual's right of privacy, which required freedom from state intrusion.[64] The majority observed:

> We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.[65]

This formulation associates privacy with the role of marriage as an institution designed to promote important societal objectives, not just to provide for individual expression. Yet, seven years later, the Court had no trouble concluding that a ban on distribution of contraceptives to unmarried persons "would be equally impermissible."[66] The Court explained:

> It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally

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of a consenting partner, because the partner was considered an accomplice. A partner's testimony, however, was admissible if he or she had not consented to the act or was a minor, and therefore incapable of consent.").

[63] 381 U.S. 479 (1965).

[64] *Id.* at 484–85.

[65] *Id.* at 486.

[66] Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

> affecting a person as the decision whether to bear or beget a child.[67]

More than three decades later, the Supreme Court's decision in *Lawrence* reflected the same tensions. The majority opinion invoked the abortion decisions to confirm "that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."[68] The Court emphasized:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[69]

In the process of broadening the extension of privacy, however, the Court removed from state sanction "[b]eliefs about these matters." If the state cannot distinguish between approved and unapproved forms of sexuality, marriage, procreation, family relationships, or child rearing, it also may not be able to ensure the legitimacy of the decisions made within these spheres. The state simply cannot intervene to restrict the available choices. Indeed, Justice Scalia's dissent emphasized that if individual sexual behavior is in fact such a protected zone of activity, then criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity should be similarly invalid.[70]

David Meyer observed that *Lawrence* embodies the tensions between the two types of family privacy mentioned above,[71] and that if the opinion

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[67] *Id.*; *see also* Jim Chen, *Midnight in the Courtroom of Good and Evil*, 16 CONST. COMMENTARY 499, 500–03 (1999) (arguing that the Court could have restricted the right to contraception to married couples, elevating the place of marriage in the constitutional scheme).

[68] Lawrence v. Texas, 539 U.S. 558, 574 (2003) (citing Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 851 (1992)).

[69] *Id.* (quoting *Casey*, 505 U.S. at 851).

[70] *Id.* at 599 (Scalia, J., dissenting).

[71] David D. Meyer, *Domesticating Lawrence*, 2004 U. CHI. LEGAL F. 453, 466.

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rested solely on the idea of individual freedom, Scalia's dissent might be right about the implications. He noted that such restrictions on state power "would represent a substantial departure from past assumptions in both constitutional and family law,"[72] and that family law has "stopped well short of ceding primary power to private individuals to define the substance and boundaries of 'family' intimacy."[73] Meyer concluded:

> After all, if taken seriously, such an approach might require public deference to highly idiosyncratic personal preferences bearing no discernable connection with, or perhaps even antithetical to, widely shared understandings of family. . . . The notion of conferring heightened constitutional protection, without textual warrant, on individual conduct regarded as unworthy of that protection by both historical and contemporary social consensus raises serious and difficult questions of judicial legitimacy.[74]

Meyer argued that for *Lawrence* to avoid the trap posed by too great an embrace of the principles of individual liberty and government neutrality, it should be understood as resting instead on recognition of "the private interest in an intimate relationship sharing in the essential goodness of *family*."[75] He emphasized that the Court reinforced the linkage between same-sex intimacy and more traditional family relations "by pointing to 'an

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> Before *Lawrence*, constitutional protection for family privacy proceeded on two tracks. Persons who asserted an interest in an accepted conception of family life, such as traditional marriage, procreation, and childrearing, received substantial protection against state interference. Even if courts did not always apply strict scrutiny in such cases, they demanded some exceptional demonstration of public need for encroachments on established family prerogatives. On the other hand, persons who asserted an unconventional understanding of family life often received only trifling protection. As in *Bowers*, courts placed these claimants outside the protected bounds of "family" and, accordingly, sustained even draconian government incursions on a mere showing of rationality.

Id.

[72] *Id.* at 468.

[73] *Id.* at 468–69.

[74] *Id.* at 469.

[75] *Id.* at 480.

emerging awareness' in society of the legitimacy of gay and lesbian relationships."[76] Meyer concluded, "This emerging consensus, evident in the rapid retreat of laws policing private sexuality in the United States and abroad, accepted that—even if society was not ready to grant full and equal status through marriage—gay and lesbian partners are at least 'entitled to respect for their private lives.'"[77]

Meyer's interpretation of *Lawrence* has not been universally accepted.[78] Putting aside, however, the issue of whether it accurately captured the Supreme Court's constitutional jurisprudence, it is a powerful statement of the dilemma that underlies state regulation of the family. Family form, in the United States and abroad, has shifted dramatically from conventional nuclear families of biologically related mothers, fathers, and children, to a variety of alternative arrangements.[79] The most recent census data showed that married couples living with their children now constitutes less than a quarter of American households.[80] The ranks of single adults, unmarried couples, single parent families, and nonfamily households raising children have all grown substantially.[81] The nonfamily households themselves may take a number of forms, ranging from extended families that include multiple generations to unrelated adults raising children together without official sanction.[82]

The idea of family privacy Meyer identified with *Lawrence* provides a measure of constitutional protection for these households. The Supreme

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[76] *Id.* at 482.

[77] *Id.*

[78] *See, e.g.*, Nelson Lund & John O. McGinnis, Lawrence v. Texas *and Judicial Hubris*, 102 MICH. L. REV. 1555, 1583 (2004) (criticizing *Lawrence* as a wrong-headed extension of substantive due process and wondering whether "something resembling the Playboy Philosophy will become the official doctrine of the United States"); *cf.* Katherine M. Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399, 1417 (2004) ("Sex gets figured, if at all, in *Lawrence* as instrumental to the formation of intimate relationships—it seems not to have a social or legal status in its own right. As a result, sexual rights qua sexual are exiled from the legal struggle on behalf of gay men and lesbians."); Mark Strasser, *Monogamy, Licentiousness, Desuetude and Mere Tolerance: The Multiple Misinterpretations of* Lawrence v. Texas, 15 S. CAL. REV. L. & WOMEN'S STUD. 95, 133–34 (2005) (summarizing different views of the opinion and concluding that *Lawrence* should be seen as affirming gay, lesbian, and other nontraditional relationships).

[79] *See* Schmitt, *supra* note 11.

[80] *Id.*

[81] *Id.*

[82] *See id.*

Court has long since found draconian distinctions between marital and nonmarital families unconstitutional, and it insisted upon constitutional recognition of established bonds between single fathers and their children.[83] Yet, providing a measure of autonomy for nontraditional households is different from providing full recognition. Meyer observed that "government may *elect* to be magnanimous in recognizing nontraditional intimate relationships—to grant individuals more freedom to define for themselves alternative forms of 'family'—but it is not likely to be *obligated* to respect the self-defining choices of those who stray from convention."[84] The same-sex couple that chooses to engage in sodomy in *Lawrence*, whether as part of a casual encounter or as a deep-seated expression of love and commitment, is free to do so, but the same couple cannot unilaterally create a state-sanctioned marriage.[85] Meyer concluded, "Self-definition of the family, by this understanding, is predominantly a matter of legislative choice, not individual prerogative."[86]

The practical result of this distinction is that the individuals in alternative households may have sexual intercourse, conceive and bear children, break up with each other, forge intense emotional ties, invite new adults into the household, and establish parenting relationships—all without the imprimatur of the state or any certainty about the rights or responsibilities that may attend dissolution of the relationships. Justice Kennedy may be right when he observed in *Lawrence* "an emerging awareness" of the legitimacy of same-sex relationships that encourages more couples to form them openly and order their lives around them.[87] But short of the recognition of same-sex marriage or civil unions that most state legislatures seem determined to fight, same-sex couples may have no certainty that the arrangements they create will receive legal recognition. And, indeed, the "culture war," as Justice Scalia described it, seems guaranteed to ensure that many state legislatures will not only refuse to extend recognition, but will make clear their disapproval of the relationships involved.[88]

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[83] For a summary of these developments, see CARBONE, *supra* note 24, at 164–79.

[84] David D. Meyer, *Self-Definition in the Constitution of Faith and Family*, 86 MINN. L. REV. 791, 794 (2002).

[85] *See, e.g.*, Nancy C. Marcus, *Beyond* Romer *and* Lawrence*: The Right to Privacy Comes Out of the Closet*, 15 COLUM. J. GENDER & L. 355, 356, 409–10 (2006).

[86] Meyer, *supra* note 84.

[87] Lawrence v. Texas, 539 U.S. 558, 572 (2003).

[88] In his dissent, Justice Scalia stated:

(*continued*)

These divisions affect more than the same-sex couples at issue in *Lawrence*. The strength of the marital presumption, after all, has not been challenged by changes in constitutional law, but by the fragility of marital relationships.[89] The relationships that underlie today's application of the presumption, much like the relationships that may involve sodomy, do not lie in a fixed universe. Although almost all states continue to recognize husbands as fathers without any further act beyond the marriage itself, a few have rejected its application altogether, permitting recognition of the biological father at any time in the child's minority.[90] Others have interpreted their state constitutions to grant biological fathers a right to establish a relationship with their children.[91] Still others have limited the application of estoppel at dissolution, effectively dismantling the family in which a child was reared.[92] Thus, it seems that the state will continue to look the other way if a husband chooses to parent his wife's child knowing that the child is not his, or if a married woman moves in with and has a child with a man to whom she is not married. In the event of a dispute, however, determination of parental standing may vary with the facts and the jurisdiction.[93]

The result is to create gray areas of family jurisprudence. The courts may now accord considerably more autonomy to individuals who would create family-like relationships without the imprimatur of the state. But in the event of a dispute, courts do not grant them the same recognition or

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> It is clear from this that the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed. Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive.

Id. at 602 (Scalia, J., dissenting).

[89] *See* Carbone, *supra* note 19, at 1312–21.

[90] *Id.* at 1317.

[91] *See, e.g.*, Callender v. Skiles, 591 N.W.2d 182 (Iowa 1999) (declaring a marital presumption unconstitutional to the extent that it granted an unmarried father no standing to challenge a husband's paternity).

[92] Carbone, *supra* note 19, at 1312–21.

[93] *See* Carbone & Cahn, *supra* note 43, at 1015; Niccol Kording, *Nature v. Nurture: Children Left Fatherless and Family-Less When Nature Prevails in Paternity Actions*, 65 U. PITT. L. REV. 811, 835–39 (2004).

insulation from review granted to more traditional families. The question then becomes what institutions, new or newly interpreted, will govern these relationships.

II. ASSISTED REPRODUCTION: PRIVACY OR RATIFICATION?

Where does assisted reproduction fit within this changing universe of family privacy? The short answer is "nowhere." The term "assisted reproduction" could refer to anything from a wife's use of a turkey baster filled with her husband's sperm[94] to a single man commissioning the birth of a child through the use of a donated egg, donated sperm, and a gestational surrogate.[95] Changing technology may or may not overlap with social understandings of reproduction. The longer answer is "everywhere." Changing technologies may combine with alternative family forms to increase the array of choices and make it harder to limit parenting to state approved venues. The history of assisted reproduction suggests that the process of winning social approval often starts with secrecy and ends with incorporation of new methods into existing family understandings. The changing meanings of privacy are more central to the process than the very public role of adoption.

A. Artificial Insemination by Donor: Is it Adultery?

Gaia Bernstein's review of the history of artificial insemination underscores the conclusion that the publicity of an adoption is the last thing prospective parents experimenting with a new—and potentially controversial—technique are likely to seek.[96] She described artificial insemination as a process that begins with experimentation, spreads in secret, deals with legal uncertainty through careful screening and advance planning, and tests the results only after establishing facts on the ground

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[94] *See* June Carbone & Paige Gottheim, *Markets, Subsidies, Regulation, and Trust: Building Ethical Understandings into the Market for Fertility Services*, 9 J. GENDER RACE & JUST. 509, 513–14 (2006).

[95] *See* John Doroghazi, Gillett-Netting v. Barnhart *and Unanswered Questions About Social Security Benefits for Posthumously Conceived Children*, 83 WASH. U. L. Q. 1597, 1601 n.25 (2005).

[96] *See* Gaia Bernstein, *The Socio-Legal Acceptance of New Technologies: A Close Look at Artificial Insemination*, 77 WASH. L. REV. 1035, 1037 (2002) ("[The story of artificial insemination is] the story of an abandoned innovation, of a rejected dissertation, of imposed silence, of dark secrets and shame and to this day – of discrimination against those considered 'unfit' to use the technology.").

that make it hard to undo the results.[97] The very public, formal process of adoption, though it could resolve uncertainty about legal parenthood, plays no role in winning acceptance for new technology.[98]

Bernstein suggested that the first reported case of artificial insemination in humans occurred in the late eighteenth century.[99] Nonetheless, more than occasional use did not begin until the 1930s.[100] A study undertaken in 1941 indicated that 9,500 women had achieved at least one pregnancy through artificial insemination, and one-third of those women used donor semen.[101] Though the numbers seem small by today's standards, contemporary commentators at the time challenged the methodology of the study and its findings.[102]

The status of children born as a result of artificial insemination by donor first arose in divorce decisions in which husbands accused their wives of adultery because of their participation in the procedure.[103] A Canadian court concluded in 1921 that not finding a wife who had another man's child through artificial insemination guilty of adultery would be a "monstrous conclusion."[104] Later cases addressed custody and visitation.[105] In 1948, a New York court granted a husband visitation rights despite the lack of a biological tie, concluding that the child was "semi-adopted."[106] When the mother moved to Oklahoma, however, the Oklahoma court refused to enforce the New York visitation order, ruling instead that the child was illegitimate.[107]

Legal uncertainty about the status of resulting children perpetuated the secrecy of the process, even as its use became more popular.[108] So long as husband and wife remained together, no one would likely inquire too closely about parental status, and parents ordinarily did not tell the children

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[97] *Id.* at 1049–59.

[98] *See id.* at 1106.

[99] *Id.* at 1049.

[100] *Id.* at 1060.

[101] *Id.* at 1064–65.

[102] *Id.* at 1065. Bernstein noted that although the study's methodology was questioned, subsequent studies confirmed the accuracy of the numbers. *Id.* at 1065 n.105.

[103] *See* Orford v. Orford, [1921] D.L.R. 251, 258.

[104] *Id.*

[105] *See, e.g.*, Abajian v. Dennett, 184 N.Y.S.2d 178, 181–82 (N.Y. Sup. Ct. 1958); Strnad v. Strnad, 78 N.Y.S.2d 390, 391–92 (N.Y. Sup. Ct. 1948).

[106] *Strnad*, 78 N.Y.S.2d at 391–92.

[107] Bernstein, *supra* note 96, at 1068.

[108] *See id.* at 1068–72.

about their origins.[109] One mother emphasized the importance of secrecy, concluding that society was not and may never be ready "to accept these children."[110]

Doctors contributed to the efforts to obscure the child's paternity. They combined the donor sperm with the husband's to give the husband some hope that the child might be his, and to frustrate legal inquiries into the child's origins.[111] They chose donors with blood types similar to the husband's in order to confound subsequent blood tests.[112] They screened couples to provide some assurance that they would be comfortable with the results, and that their relationship would endure.[113] They advised their patients to draw up wills to avoid intestacy and consent forms to establish the basis for estoppel claims.[114] They also entered the husband's name on the birth certificate "even when the sperm was a donor's."[115] In an era before DNA testing, these measures made it less likely that anyone would inquire, or be able to rebut the marital presumption of paternity if the issue arose.[116]

By the 1960s, courts began to recognize consenting husbands' obligations to the resulting children on the basis of implied contract or estoppel,[117] and Georgia and Oklahoma enacted the first statutes legitimizing artificial insemination procures with the consent of both a husband and a wife.[118] After greater acceptance of the practice, the Uniform Parentage Act of 1973 (UPA of 1973) recognized the parental status of husbands who had consented to their wives' use of artificial

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[109] *See id.* at 1072.

[110] *Id.* at 1072 n.136.

[111] *Id.* at 1080.

[112] *Id.* at 1081.

[113] *Id.* at 1082.

[114] *See id.*

[115] *Id.* at 1081.

[116] *See id.* at 1080–81.

[117] *See, e.g.*, Gursky v. Gursky, 242 N.Y.S.2d 406, 411 (N.Y. Sup. Ct. 1963) ("The husband's declarations and conduct respecting the artificial insemination of his wife by means of a third party-donor . . . implied a promise on his part to furnish support for any offspring resulting from the insemination."); People v. Sorenson, 437 P.2d 495, 499 (Cal. 1968) ("[A] reasonable man who . . . participates and consents to his wife's artificial insemination in the hope that a child will be produced whom they will treat as their own, knows that such behavior carries with it the legal responsibilities of fatherhood and criminal responsibility for nonsupport.").

[118] Bernstein, *supra* note 96, at 1087.

insemination by donor.[119] In 1987, 172,000 women underwent artificial insemination, and thirty-four states have since adopted legislation governing artificial insemination.[120] But the new legislation did not eliminate uncertainty about parental status. Sixteen states limit severance of donors' parental status to those who contribute to married women, and about half of the states with legislation require that a doctor supervise the insemination.[121] Other states ratify the parental status of those who sign the right forms, but these states are silent about husbands who orally consent and raise the child without ever completing the needed paperwork.[122] Estoppel and implied contracts continue to provide after-the-fact resolutions that bridge many of the gaps without providing ex ante guarantees.[123]

Legislative provisions for artificial insemination have two components—severing the parental rights of the donor and recognizing the parental standing of the mother's partner—but the two do not necessarily operate in tandem.[124] Even though virtually all states will recognize a husband who has consented to his wife's insemination as a legal parent without adoption, some states sever the parental rights of a donor without substituting another parent, and other states do so even when the mother has a partner she would like to recognize.[125] As a result, while artificial insemination clearly falls within the rubric of family privacy in all of its multiple meanings for married couples, it may not for others.

For the growing number of single women who use sperm banks as a substitute for the partner they have been unable to find,[126] the law may

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[119] UNIF. PARENTAGE ACT § 5, 9A U.L.A. 592 (1979).

[120] Howard Fink & June Carbone, *Between Private Ordering and Public Fiat: A New Paradigm for Family Law Decision-making*, 5 J. L. FAM. STUD. 1, 54 (2003).

[121] *Id.* at 54–55 & n.294.

[122] *Id.* at 55.

[123] *Id.* at 54.

[124] *See id.* at 54–55.

[125] *See id.*

[126] Bernstein observed that unmarried women have had to shop carefully to find clinics willing to inseminate them. Bernstein, *supra* note 96, at 1099. She reported:

> Data collected in 1987 demonstrated that the . . . medical profession still inhibited the insemination of single women and lesbians. The most common non-medical reason for the rejection of a woman seeking AI was her being unmarried. Fifty-two percent of the practitioners reported rejecting a patient on this basis. Fifteen percent of the physicians reported rejecting a patient because she was a lesbian.

(*continued*)

either refuse to sever the parental rights of the donor or supply no father at all.[127] In these cases, the anonymity of the donor provides a large measure of protection, because an unknown donor who does not have access to identifying information about the child cannot come knocking on the door.[128] On the other hand, such single mothers may feel no need for secrecy about the process itself—they are clearly single parents and experience no negative associations with infertility. They are increasingly creating families of choice with—and in many cases without—the sanction of law.[129]

For an unmarried woman with a partner, the partner's status is subject to greater doubt.[130] In the vast majority of states, only marriage confers parental status on a partner who is not biologically related to the child without adoption.[131]

B. Surrogacy: Is it "Baby-Selling"?

Surrogacy, of course, may also involve artificial insemination; the child whom the surrogate bears is ordinarily conceived either through

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> Moreover, when asked directly, physicians were equally divided as to whether or not they were likely to reject an unmarried recipient. If the unmarried recipient did not have a partner, the proportion of physicians who were likely to reject her rose to sixty-one percent. If the patient was a lesbian, the number increased to sixty-three percent.

Id.; *see also* Richard F. Storrow, *Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction*, 39 U.C. DAVIS L. REV. 305 (2006) (summarizing state laws and the effect of the emphasis on marriage).

[127] *See* Fink & Carbone, *supra* note 120, at 55 & n.294.

[128] *See* Alison Harvison Young, *Reconceiving the Family: Challenging the Paradigm of the Exclusive Family*, 6 AM. U.J. GENDER & L. 505, 545 (1998).

[129] *See* Vickie L. Henry, *A Tale of Three Women: A Survey of the Rights and Responsibilities of Unmarried Women Who Conceive by Alternative Insemination and a Model for Legislative Reform*, 19 AM. J. L. & MED. 285, 288 (1993).

[130] *Id.* at 299.

[131] The law in some states is providing greater recognition of functional parenthood. *See* Sanja Zgonjanin, *What Does it Take To Be a (Lesbian) Parent? On Intent and Genetics*, 16 HASTINGS WOMEN'S L.J. 251, 256 (2005). The difficulty, however, is that categories such as "psychological parent," "de facto parenthood," "in loco parentis," parenthood by estoppel, and second-parent adoption generally depend on a relationship established over time and provide no security to partners who would like their status recognized at the child's birth. *See id.* (summarizing the doctrines and noting that only a few states have adopted them).

artificial insemination with the intended father's sperm or though in vitro fertilization with a donor egg fertilized in a lab.[132] By the time *Baby M* exploded into public consciousness in the late 1980s,[133] however, the association of artificial insemination by donor sperm with adultery had waned, and concern over the specter of a mother bearing a child to be raised by someone else replaced it.[134]

The media circus surrounding the *Baby M* case inflamed all of the fears surrounding surrogacy.[135] Bill Stern, whose parents had been the only members of their respective families to survive the Holocaust, wanted to continue his family line.[136] His wife, Elizabeth, had multiple sclerosis and feared that pregnancy would aggravate the illness.[137] Through an agency, Stern hired Mary Beth Whitehead, who already had children of her own, to bear his child.[138] After the baby was born, however, Whitehead was distraught over the thought of giving her up, and absconded with the child to Florida.[139] The authorities found Whitehead in Florida, and literally tore the baby from her arms.[140] Although the trial court sided with the Sterns, the New Jersey Supreme Court ruled, in accordance with the

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[132] In some cases, such as the *Buzzanca* case, the child may bear no genetic relationship to any of the parties. *See generally In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998).

[133] *In re* Baby M, 537 A.2d 1227 (N.J. 1988).

[134] *See* Molly J. Walker Wilson, *Precommitment in Free-Market Procreation: Surrogacy, Commissioned Adoption, and Limits on Human Decision Making Capacity*, 31 J. LEGIS. 329, 333 (2005). Wilson stated,

> Surrogacy . . . [in contrast to adoption] is arranged in advance and involves a surrogate voluntarily entering into a pregnancy where the sole purpose is to provide a child for someone else. In order to induce a woman to perform such a task, payment is usually provided to the surrogate. This has led some to characterize surrogacy as a form of babyselling.

Id. See also June R. Carbone, *The Role of Contract Principles in Determining the Validity of Surrogacy Contracts*, 28 SANTA CLARA L. REV. 581, 598 (1988); Jill Elaine Hasday, *Intimacy And Economic Exchange*, 119 HARV. L. REV. 491, 513–14 (2005).

[135] D. KELLY WEISBERG, THE BIRTH OF SURROGACY IN ISRAEL 32 (2005).

[136] *Id.* at 32–33.

[137] *Id.*

[138] *Id.* at 35.

[139] *In re* Baby M, 537 A.2d 1227, 1237 (N.J. 1988).

[140] *Id.*

law then and in almost all states today,[141] that Whitehead was the child's legal mother, and parenthood could be transferred to Mrs. Stern only through adoption.[142]

The New Jersey Supreme Court, which sought to discourage commercial surrogacy, warned of the evils of baby-selling:

> The evils inherent in baby-bartering are loathsome for a myriad of reasons. The child is sold without regard for whether the purchasers will be suitable parents. The natural mother does not receive the benefit of counseling and guidance to assist her in making a decision that may affect her for a lifetime. In fact, the monetary incentive to sell her child may, depending on her financial circumstances, make her decision less voluntary. Furthermore, the adoptive parents may not be fully informed of the natural parents' medical history.
>
> Baby-selling potentially results in the exploitation of all parties involved.[143]

Scholars mirrored the deep public division about the cases. Traditionalists were disturbed at the idea of a mother conceiving a child and relinquishing it to the father for payment; they viewed Whitehead's desire to keep the

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[141] The notable exception is an Arkansas statute recognizing the intended parents as the legal parents. *See* ARK. CODE ANN. § 9-10-201(b) (2002).

[142] *In re Baby M*, 537 A.2d at 1234. The New Jersey Supreme Court held:

> We invalidate the surrogacy contract because it conflicts with the law and public policy of this State. While we recognize the depth of the yearning of infertile couples to have their own children, we find the payment of money to a "surrogate" mother illegal, perhaps criminal, and potentially degrading to women. Although in this case we grant custody to the natural father, the evidence having clearly proved such custody to be in the best interests of the infant, we void both the termination of the surrogate mother's parental rights and the adoption of the child by the wife/step-parent. We thus restore the "surrogate" as the mother of the child.

Id. *See also* Janet L. Dolgin, *An Emerging Consensus: Reproductive Technology and the Law*, 23 VT. L. REV. 225, 257–58 (1998). The court awarded the Sterns custody in light of the fact that Baby M had been with them during the years of litigation, but gave Whitehead visitation. *In re Baby M*, 537 A.2d at 1259–63.

[143] *In re Baby M*, 537 A.2d at 1241–42 (citations omitted).

child as understandable and commendable.[144] Feminists were concerned that wealthy men would be able to exploit poor women who were in need of money to give up their children.[145] Those who identified with the Sterns were appalled by Whitehead's breach of her agreement to them,[146] the New Jersey court's suggestion that in future cases the law would favor an award of custody to the mother irrespective of the contract,[147] and the press's vilification of the not entirely infertile Mrs. Stern.[148]

The response to the *Baby M* case prompted two changes in surrogacy practice. The most immediate was greater discretion in use of the procedure.[149] In the aftermath of the case, a few states banned surrogacy outright[150] or banned payment for surrogacy.[151] Other states, which did not directly address the permissibility of the practice, considered the contracts void and unenforceable.[152] In the face of hostile legislation, some agencies moved elsewhere or more effectively screened their clients.[153] And many

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[144] *Id.* at 1259. The New Jersey Supreme Court, which emphasized that Mary Beth Whitehead was the child's mother, observed that Mrs. Whitehead's action in fleeing with the child "merits a measure of understanding" because "it is expecting something well beyond normal human capabilities to suggest that this mother should have parted with her newly born infant without a struggle." *Id.*

[145] *See* JANICE G. RAYMOND, WOMEN AS WOMBS: REPRODUCTIVE TECHNOLOGIES AND THE BATTLE OVER WOMEN'S FREEDOM 141–43 (1993).

[146] *See* Golnar Modjtahedi, *Nobody's Child: Enforcing Surrogacy Contracts*, 20 WHITTIER L. REV. 243, 274 (1998).

[147] *See id.* at 273.

[148] *See, e.g.*, Raymond Coffey, *Do We Really Want to Sanction the Idea of Wombs for Rent?*, CHI. TRIB., Apr. 3, 1987, § 1, at 21.

[149] *See, e.g.*, Lisa Belkin, *Surrogate Law vs. Last Hope of the Childless*, N.Y. TIMES, July 28, 1992, at B1 (indicating that if the use of the procedure did not decrease, it became more secretive).

[150] *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-218 (West 2000); D.C. CODE § 16-402 (2001).

[151] KY. REV. STAT. ANN. § 199.590(4) (West 1994); MICH. COMP. LAWS. ANN. § 722.859 (West 2002) (criminalizing inducing or assisting surrogacy contracts for compensation); WASH. REV. CODE ANN. § 26.26.240 (West 2005); UTAH CODE ANN. § 76-7-204(1)(a) (2003) (repealed 2005). The repeal of section 76-7-204 was foreshadowed when *J.R. v. Utah*, 261 F. Supp. 2d 1268 (D. Utah 2002), held section 76-7-204(3)(a), which automatically granted a gestational carrier surrogate the status of legal mother, unconstitutional as applied to the plaintiffs in that case. *Id.* at 1293.

[152] IND. CODE ANN. § 31-20-1-3 (West 1999); LA. REV. STAT. ANN. § 9:2713 (2005); NEB. REV. STAT. § 25-21 (1995); N.D. CENT. CODE § 14-18-05 (2004).

[153] *See* Belkin, *supra* note 149.

families simply kept quiet about their participation in surrogacy arrangements.[154]

The Connecticut case of *Doe v. Doe*[155] illustrated the effectiveness of creating "facts on the ground." The birth mother, who used artificial insemination to conceive a child using Mr. Doe's sperm, entered the hospital under Mrs. Doe's name.[156] She had Mr. and Mrs. Doe listed as the child's parents on the birth certificate, and the Does raised the child from birth.[157] No adoption proceedings were initiated.[158] The couple divorced when the child was seven and agreed that Mrs. Doe would have primary custody.[159] Nearly four years later, the father alleged for the first time that there were no children born to the marriage.[160] The Connecticut Supreme Court finally decided the case when the child was fourteen, concluding that her best interests lie with continuation of the joint custody award that established her principal residence with Mrs. Doe.[161] The court, in a classic ex post decision, was not about to take a fourteen-year-old away from the only mother she had known, whether or not it approved of the circumstances of her birth.[162] The case, however, provided no certainty whether another dispute, taking place shortly after the couple separated or shortly after the child was born, would be decided the same way.[163]

The more far reaching change occurred with the advent of in vitro fertilization. In vitro separated the genetic contribution from gestation, making it possible for a surrogate to give birth to a child conceived with an egg from the intended mother or a donor unrelated to the surrogate.[164] It seems that many of those who were uncomfortable with the prospect of a birth mother giving up "her own child" would have fewer qualms about a gestational surrogate carrying the egg of a woman who, often because of

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[154] *See id.*

[155] 710 A.2d 1297, 1302 (Conn. 1998), *overruled in part by In re* Joshua S., 796 A.2d 1141 (Conn. 2002).

[156] *Id.* at 1302–03.

[157] *Id.*

[158] *Id.* at 1301. The child was born in 1983 (several years before the *Baby M* case). *Id.*

[159] *Id.*

[160] *Id.* at 1301 & n.9.

[161] *Id.* at 1323–24.

[162] *See id.* at 1301.

[163] *See In re* Joshua S., 796 A.2d 1141, 1155 n.17 (Conn. 2002) (overruling *Doe* in part on different facts in light of the Supreme Court's decision in *Troxel*).

[164] Malina Coleman, *Gestation, Intent, and the Seed: Defining Motherhood in the Era of Assisted Human Reproduction*, 17 CARDOZO L. REV. 497, 502 (1996).

cancer treatments or other illness, could not bear the child on her own. The highly publicized California case of *Johnson v. Calvert*,[165] which held that intent controlled when the genetic and gestational mothers differed,[166] symbolized a shift in attitudes. After this case, some state legislatures expressly sanctioned surrogacy, though they limited approval to married couples who employed a surrogate to bear a child who would be genetically related to at least one of the intended parents.[167] Elsewhere, surrogacy remained a gray area, but one where intended parents believed that even without ex ante authorization, the courts would not take away a child from the genetic parents who were raising her ex post.[168]

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[165] 851 P.2d 776 (Cal. 1993).

[166] *Id.* at 782.

[167] Statutes in Florida, Nevada, New Hampshire, and Virginia all contain provisions limiting recognition of surrogacy to married couples and requiring at least one of the intended parents to be a genetic parent of the child. *See* FLA. STAT. ANN. §§ 742.13(2), 742.15(1) (West 2005); NEV. REV. STAT. ANN. § 126.045 (LexisNexis 2004); N.H. REV. STAT. ANN. § 168-B:1(XII), 168-B:17 (LexisNexis 2001); VA. CODE ANN. §§ 20-156 to 20-160(B)(9) (LexisNexis 2004). The Uniform Parentage Act of 2000 (UPA of 2000) would have also recognized the intended parents in a gestational agreement as parents if the intended parents were married and went through an adoption-like procedure beforehand. *See* Helene S. Shapo, *Assisted Reproduction and the Law: Disharmony on a Divisive Social Issue*, 100 NW. U.L. REV. 465, 475 (2006). After much dissension, the UPA of 2000 was changed in 2002 to remove the limitation to married parents, though the statute still limits recognition to a "man and a woman." *Id.* Less than ten states have adopted either the 2000 or 2002 version of the UPA, however. *See id.* Texas and Washington adopted the 2000 version, though Washington added a provision outlawing paid surrogacy. *See* TEX. FAM. CODE § 160.001 to 160.763 (Vernon 2002 & Supp. 2006); WASH. REV. CODE ANN. §§ 26.26.010 to 26.26.913 (West 2005) (the added provision outlawing paid surrogacy is located at section 26.26.240); *see also* Storrow, *supra* note 126, at 315–16. Three of the five states that adopted the 2002 provisions eliminated the article addressing surrogacy. *See* DEL. CODE ANN. tit. 13 §§ 8-101 to 8-904 (Supp. 2006) (eliminated surrogacy provisions); N.D. CENT. CODE §§ 14-20-01 to 14-20-66 (Supp. 2005) (eliminated surrogacy article); OKLA. STAT. ANN. tit. 10 §§ 7700-101 to 7700-902 (West 2007) (eliminated the article addressing surrogacy); UTAH CODE ANN. §§ 78-45g-101 to 78-45g-902 (Supp. 2006) (surrogacy sections can be found from section 78-45g-801 to section 78-45g-902); WYO. STAT. ANN. §§ 14-2-401 to 14-2-907 (2005) (surrogacy provisions can be found from section 14-2-801 to section 14-2-823); *see also* Shapo, *supra*, at 475. Two other states are considering enacting the UPA. *See* Storrow, *supra* note 126, at 316 (noting that as of February 2006, two states—Illinois and New Mexico—were considering enacting the UPA).

[168] Nonetheless, there is no agreement on the standard to be applied. *See* Amy M. Larkey, *Redefining Motherhood: Determining Legal Maternity in Gestational Surrogacy* (*continued*)

The use of surrogates who bore no genetic relationship to the child, moreover, provided intended parents with greater confidence that their parenthood would be recognized even without a genetic connection. *In re Marriage of Buzzanca*[169] became the first case to ratify the process. The intended parents, who bore no biological connection to the child, secured the child's conception and birth through the services of an egg donor, sperm donor, and gestational surrogate.[170] The trial court ruled initially that the child literally had no parents.[171] Under California law, the egg and sperm donors had severed their parental rights.[172] Furthermore, the trial court accepted the stipulation of the surrogate and her husband surrendering any parental status they might have, and that the intended parents had no connection to the child through biology, marriage, or adoption.[173] The outraged court of appeals stated bluntly, "Let us get right to the point: [the child] never would have been born had not [the intended parents] both agreed to have a fertilized egg implanted in a surrogate."[174] It concluded that intent alone could establish parenthood, observing, "Even though neither Luanne nor John are biologically related to Jaycee, they are still her lawful parents given their initiating role as the intended parents in her conception and birth."[175] While other jurisdictions have not necessarily followed California's lead in determining parentage,[176] the publicity

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Arrangements, 51 DRAKE L. REV. 605, 622 (2003). Larkey reported, "State courts and legal scholars have developed four different approaches for determining legal maternity in gestational surrogacy arrangements: (1) intent-based theory [California, Nevada, New York]; (2) genetic contribution theory [Ohio]; (3) gestational mother preference theory [North Dakota, Arizona]; and (4) the 'best interest of the child' theory [Michigan, Utah]." *Id.*; *see also*, Coleman, *supra* note 164, at 505–29 (discussing the above tests).

[169] 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998).

[170] *Id.* at 282.

[171] *Id.*

[172] *See* CAL. FAM. CODE § 7613 (West 2004) (providing that a sperm donor is not the natural father of a child conceived using his sperm); Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993) (stating that where a child is procreated using an egg donor, the birth mother is the mother, and not the egg donor).

[173] *Buzzanca*, 72 Cal. Rptr. 2d at 282–83.

[174] *Id.* at 282.

[175] *Id.* at 293. *But see* Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 621–22 (2002) (questioning whether *Buzzanca* in fact relied on intent only).

[176] R. Alta Charo, *Biological Determinism in Legal Decision Making: The Parent Trap*, 3 TEX. J. WOMEN & L. 265, 294 (1994) (noting that in most countries, the woman who gives birth is recognized as the legal mother of the child).

attending these cases held out the prospect to infertile couples worldwide of arranging the birth of "their own children."

The Buzzancas appeared to go to so much trouble to create a child and retain control of the process, and many couples seem to choose surrogacy or in vitro over adoption in order to be able to have such control.[177] Adoption studies report that "[t]hese adopters recalled the sense of powerlessness they felt, the invasiveness of the close scrutiny they endured, and their disillusionment with a process they experienced as 'baby-selling,' as well as the absence of post-adoption support and a sense of stigma and less-than-full legitimacy about their parental status."[178]

The alternative, however, sometimes seems a little too close to production of children on demand. As Appleton emphasized, the use of sperm and egg donors allows infertile couples to choose something about the genetic makeup of the child they plan to raise,[179] and the addition of a gestational surrogate makes it less likely that the courts will side with the surrogate in the event of dispute,[180] but some say that the process also raises the risk of complications for the resulting children.[181] As with artificial insemination, moreover, the combination of in vitro fertilization with surrogacy also increases the variety of circumstances in which childrearing may occur.[182] The use of a gestational surrogate to give birth to the genetic child of the intended parents is no longer controversial in many jurisdictions, and the combination of an egg donor with a gestational surrogate to produce a child genetically related to the husband of an infertile woman is only slightly more objectionable.[183] More controversial than the technique is its extension to provide children for single men and

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[177] *See* Appleton, *supra* note 6, at 428–29.

[178] *Id.* at 430; *see also* Judith C. Daniluk & Joss Hurtig-Mitchell, *Themes of Hope and Healing: Infertile Couples' Experiences of Adoption*, 81 J. COUNSELING & DEV. 389, 393–96 (2003) (discussing the powerlessness of adoptive parents in the adoption process).

[179] *See* Appleton, *supra* note 6, at 407.

[180] *Id.* at 418.

[181] *See* FREUNDLICH, *supra* note 8, at 25–26. *But see* ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION, INFERTILITY, AND THE NEW WORLD OF CHILD PRODUCTION 93 (1999) (characterizing these attitudes as "biologism," and arguing that they stigmatize adoption and prompt reliance on medical interventions for those experiencing infertility instead of exploring other routes to parenting).

[182] Appleton, *supra* note 6, at 406–07.

[183] *See id.* at 414. For a fascinating account of legislation authorizing these developments in Israel, see D. KELLY WEISBERG, THE BIRTH OF SURROGACY IN ISRAEL (2005).

gay and lesbian couples.[184] Two recent controversies underscore the continuing uncertainty.

An unmarried professor in his sixties, who lived in Ohio, was involved in a relationship with a woman who could not have additional children.[185] Through an Indiana agency, he hired an egg donor in Texas, and a gestational surrogate in Pennsylvania.[186] The surrogate became pregnant with triplets, and she gave birth five weeks early in Pennsylvania.[187] The surrogate felt that the intended parents, who were given little notice of the delivery and had to travel from Cleveland to visit,[188] were not sufficiently concerned about the babies' well-being, and had not bonded with them in the hospital.[189] When the babies were ready to be discharged, the surrogate, in violation of the surrogacy contract, took them home with her.[190] The result was a host of lawsuits, reflecting different approaches to the underlying issues.[191]

The initial suit was a custody action in Pennsylvania.[192] The trial court found in April 2004 that the contract was void as against public policy because it failed to name a legal mother for the children,[193] and that in absence of a legal mother, the surrogate became a legal parent "since she carried and bore them and has taken care of them as a natural parent would."[194] Two years later, in April 2006, a Pennsylvania appellate court reversed.[195] While the trial court's decision clearly sympathized with the surrogate, the appellate court was dramatically more supportive of the commissioning father.[196] The trial court treated the parties as anonymous;[197] the appellate opinion described the father as "a math professor and department chair at Cleveland State University in Cleveland,

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[184] *See* Storrow, *supra* note 175, at 639–40.

[185] J.F. v. D.B., 897 A.2d 1261, 1265 (Pa. Super. Ct. 2006).

[186] *Id.* at 1265–66.

[187] *Id.* at 1266–67.

[188] *Id.* at 1267.

[189] *Id.* at 1269.

[190] *Id.*

[191] *See* J.F. v. D.B., 66 Pa. D. & C.4th 1 (Pa. C.P. 2004); *J.F.*, 897 A.2d at 1261; J.F. v. D.B., 848 N.E.2d 873 (Ohio Ct. App. 2006), *cert. granted*, 852 N.E.2d 187 (Ohio 2006).

[192] *See J.F.*, 66 Pa. D. & C.4th at 1.

[193] *Id.* at 33.

[194] *Id.* at 24.

[195] *See J.F.*, 897 A.2d 1261, 1281 (Pa. Super. Ct. 2006).

[196] *See id.*

[197] *See J.F.*, 66 Pa. D. & C.4th at 4.

Ohio."[198] The trial court decision described his partner as his "paramour," and emphasized her lack of a legal relationship to the children.[199] The appellate decision noted that she was a widowed dentist, she had retired in order to be able to take care of the children, she and the father were in a long term relationship, they had not married because of the impact of marriage on her benefits, they were willing to marry if necessary to obtain custody of the children, and they had begun preparations for adoption before the children were born.[200] The appellate court also emphasized the intended parents' difficulties in traveling from Cleveland on short notice, particularly in light of the fact that the surrogate did not tell them of the scheduled cesarean section, and the misinformation they received from the hospital.[201] The appellate court concluded, two years after the children were born, that the surrogate lacked standing to seek custody because she had no "biological" connection to the children and had gained in loco parentis status in defiance of the legal parents' wishes.[202]

In the meantime, the Ohio courts also issued two appellate decisions in the matter.[203] One found the surrogacy contract valid and the surrogate in breach.[204] As a result, it ordered the surrogate and her husband to refund any payments they received from the father, and to indemnify him for any child support ordered by the Pennsylvania courts.[205] In the other action, the Ohio courts found that the intended father and the egg donor were the legal parents of the children on the basis of biology, but remanded for a

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[198] *J.F.*, 897 A.2d at 1265.

[199] *J.F.*, 66 Pa. D. & C.4th at 4, 24.

[200] *J.F.*, 897 A.2d at 1265 n.2, 1268 n.9 and accompanying text.

[201] *Id.* at 1276.

[202] *Id.* at 1280. The appellate court stated:

> This case involves a biological father seeking custody of his children from a third party gestational carrier who is not the children's biological mother, and who took the children from the hospital in direct defiance of Father's wishes after she completely changed her mind about how matters would proceed. There is no law in this Commonwealth that accords standing to a surrogate with no biological connection to the child she seeks to take into her custody. Today, on these facts, we decline to grant such a party standing.

Id.

[203] J.F. v. D.B., 848 N.E.2d 873 (Ohio Ct. App. 2006), *cert. granted*, 852 N.E.2d 187 (Ohio 2006); Rice v. Flynn, No. 22416, 2005 WL 2140576 (Ohio Ct. App. Sept. 7, 2005).

[204] *J.F.*, 848 N.E.2d at 799.

[205] *Id.* at 800–01.

determination of whether the donors had waived those rights.[206] The court also found that it did not need to give the Pennsylvania judgment full faith and credit in Ohio because the Pennsylvania court had not joined the egg donor in the action.[207]

Although both the Ohio and Pennsylvania courts ultimately concluded that the gestational surrogate was not a legal parent, and that the commissioning father was entitled to custody,[208] the initial Pennsylvania decision reflects courts' continuing discomfort with surrogacy. The court objected most vehemently to the contracts' failure to specify a legal mother.[209] Even though single mothers have now won a large measure of deference, intentionally single fathers remain suspect. One suspects that the Pennsylvania appellate court that overruled the gestational surrogate's standing to seek custody felt comforted by the presence of another woman committed to the children. The issue of age, while not mentioned directly in the case, may also have played a role. Assisted reproduction permits would-be parents to circumvent nature's limits on reproduction, but it cannot eliminate concerns about mortality. The Pennsylvania trial court, although it did not mention age, emphasized the failure of the intended father to provide for substitute parents in the event of the unexpected.[210] Finally, the court used marriage as a signal of commitment to the child, treating the unmarried intended mother as a nonparty and a nonfactor.[211] In fact, as the court of appeals emphasized, the intended mother had initiated adoption proceedings by the time of the ruling.[212] In this case, the parties did seek adoption—as a substitute for marriage. Neither the parties nor the courts sought to (nor effectively could) use adoption procedures to resolve the dispute between the commissioning father and the gestational mother. That dispute, which the trial court originally framed as a custody issue, ultimately turned on the parental standing, one way or the other, of the gestational surrogate.[213] Adoption served instead as a way to secure the state's legal imprimatur on the step-parent status of the father's unmarried partner.

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[206] *Rice*, 2005 WL 2140576, at *9.

[207] *Id.* at *7.

[208] *J.F.*, 848 N.E.2d at 879; J.F. v. D.B., 897 A.2d 1261, 1281 (Pa. Super. Ct. 2006).

[209] *See, e.g.*, J.F. v. D.B., 66 Pa. D. & C.4th 1, 19 (Pa. C.P. 2004).

[210] *Id.* The court observed, "At no time does the contract state who the legal mother of the children shall be, particularly if something were to happen to J.F. and E.D." *Id.*

[211] *Id.* at 24.

[212] J.F. v. D.B., 897 A.2d at 1266 n.4, 1268 n.9.

[213] *See id.* at 1272–73.

A series of California cases have also focused new attention on parentage in the context of assisted reproduction. The California Supreme Court addressed three cases in 2005 that involved recognition of the parenting status of lesbian couples who had used assisted reproduction to conceive a child.[214] Although California has long had second parent adoption,[215] it has not been readily obtainable for unmarried couples. When the state first started recognizing these adoptions, California's Department of Social Services implemented a policy whereby its social workers are instructed to deny a petition for adoption by an unmarried couple.[216] Even though the department changed this policy in 1995, then Governor Wilson ordered the department to return to its original policy, chilling the second parent adoption practice.[217] It is understandable that prospective parents would view the home study as intrusive and that gay and lesbians parents would find it particularly distasteful when it is structured to pass judgment on them—all the more so when the standards are stacked against them from the outset. They interpreted *Buzzanca*'s emphasis on intent as an opening.[218] In a series of trial court decisions, gay and lesbian advocates invoked intent to secure prebirth declarations of parentage. The first appellate determination of the validity of these judgments went against them. In *Kristine H. v. Lisa R.*, the court held that UPA declarations were void because parties could not contract privately to establish parental status.[219] Nonetheless, the California Supreme Court held that the biological mother was estopped from denying her partner's parental status, given her earlier invocation of the jurisdiction of the courts to do so.[220]

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[214] Elisa B. v. Superior Court, 117 P.3d 660 (Cal. 2005); K.M. v. E.G., 117 P.3d 673 (Cal. 2005); Kristine H. v. Lisa R., 117 P.3d 690 (Cal. 2005).

[215] *See* Sharon S. v. Superior Court, 73 P.3d 554, 568 (Cal. 2003) (upholding the practice and observing that between 10,000 and 20,000 second parent adoptions have been granted in the state).

[216] Emily Doskow, *The Second Parent Trap: Parenting For Same-Sex Couples in a Brave New World*, 20 J. JUV. L. 1, 6–7 (1999).

[217] *Id.* at 7.

[218] *See id.* at 21.

[219] *Kristine H.*, 117 P.3d at 693. The intermediate appellate court held, "A determination of parentage cannot rest simply on the parties' agreement." *Id.* The California Supreme Court vacated the appellate court's determination without deciding the issue of the validity of the trial court's declaratory judgment recognizing the parentage of the biological mother's partner on the basis of intent. *Id.* at 692.

[220] *Id.* at 696. The court held:

(*continued*)

A more far reaching ruling came in the companion case of *Elisa B. v. Superior Court*, which did not involve an effort to secure a prebirth or other determination of parental status.[221] The Court nonetheless concluded:

> [We] believe the Legislature would have intended to impose upon the presumed father or mother the legal obligation to support the child whom she caused to be born. As stated by amicus curiae the California State Association of Counties, representing all 58 counties in California: "A person who actively participates in bringing children into the world, takes the children into her home and holds them out as her own, and receives and enjoys the benefits of parenthood, should be responsible for the support of those children—regardless of her gender or sexual orientation.[222]

Therefore, a California couple, whether married, registered as domestic partners or not, who arrange for the birth of a child, welcome that child into their household, and hold out the child as their own, become legal parents without any other legal action.[223] The doctrine has been applied to both heterosexual and same-sex couples, and it is not necessarily limited to those who directly participate in arranging the child's birth.[224]

> Given that the court had subject matter jurisdiction to determine the parentage of the unborn child, and that Kristine invoked that jurisdiction, stipulated to the issuance of a judgment, and enjoyed the benefits of that judgment for nearly two years, it would be unfair both to Lisa and the child to permit Kristine to challenge the validity of that judgment. To permit her to attack the validity of the judgment she sought and to which she stipulated would "trifle with the courts." It would also contravene the public policy favoring that a child has two parents rather than one.

Id. (citations omitted).

[221] *See* Elisa B. v. Superior Court, 117 P.3d 660, 662 (Cal. 2005) (considering the child support obligations of a woman who had supported her partner's artificial insemination and had agreed to raise the children with her partner).

[222] *Id.* at 670.

[223] *Id.*

[224] *See In re* Nicholas H., 46 P.3d 932, 933–34 (Cal. 2002) (holding that the presumption that a man who receives a child into his home and openly holds the child out

(*continued*)

The most controversial of the three cases extended parentage to an egg donor who had signed the forms severing her parental rights before the ovum was implanted in her partner.[225] The court held that the provisions of California law permitting termination of the parental status of a sperm donor did not apply because the "donor" provided the ovum to produce a child who would be raised in a joint home.[226] The court explained that where the genetic mother planned to raise the child together with her partner, any intent to sever parental standing (if it existed on the basis of the conflicting testimony in the case) would be ineffective.[227]

In addition, California's domestic partnership legislation, like the Vermont civil union statute, extends the marital presumption to registered partners despite the impossibility of biological parentage.[228] While the three California Supreme Court cases discussed above involved artificial insemination,[229] the cases rested on California's determination to guarantee two parents for every child, and they could easily apply to surrogacy arrangements as well.[230] Together with the domestic partnership

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as his natural child is not necessarily rebutted when he admits that he is not the child's biological father).

[225] *See* K.M. v. E.G., 117 P.3d 673, 675–76 (Cal. 2005).

[226] *Id.* at 675, 679.

[227] *Id.* at 682. The vigorous dissent argued instead for upholding an intent-based standard on the basis of *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993), which used intent as a "tiebreaker" in a disputed gestational surrogacy arrangement. *K.M.*, 117 P.3d at 685–90 (Werdegar, J., dissenting). *See also* FREUNDLICH, *supra* note 8, at 15 (citing Rebecca Mead, *Annals of Reproduction: Eggs for Sale*, NEW YORKER, Aug. 9, 1999, at 63) (noting the promotion of parentage based on intent by the "fertility industry").

[228] *See* CAL. FAM. CODE § 297.5(d) (West Supp. 2006) ("The rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses."); *see also* VT. STAT. ANN. tit. 15, § 1204(f) (2002) ("The rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of a married couple, with respect to a child of whom either spouse becomes the natural parent during the marriage."). For an excellent discussion of the implications of these developments, see generally Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227 (2006).

[229] See Appleton, *supra* note 228, at 260–93, for an exploration of what this type of approach might mean for gay males as opposed to lesbian couples.

[230] Indeed, the California rulings suggest that where a genetic father and his partner welcome the child into their household and hold out the child as their own, both will be recognized as parents whether or not they are registered domestic partners. The issue the California Supreme Court did not resolve in *K.M.*, however, is the parental standing of the ovum donor and/or the gestational surrogate, which is the same issue that troubled the Pennsylvania courts in *J.F.* *See K.M.*, 117 P.3d at 681–82.

legislation, these cases formally severed any pretense of a biological tie as a critical element in parentage determinations, and at least in theory eliminated the need for adoption. As a practical matter, the cases combine the parties' ex ante intentions[231] in initially undertaking parental responsibilities with an ex post conclusion that the parties have in fact assumed parental roles. These rulings have the potential to fundamentally remake the law of parentage. What they cannot compel is recognition across the fifty states.

III. ADOPTION: RATIFICATION OF PRIVATE CHOICE OR STATE IMPRIMATUR?

A. When Will Parents Elect Adoption?

Gaia Bernstein explored the origination, diffusion, and acceptance of artificial insemination as a story about technology, and its ability to reshape family choices.[232] In contrast, Marsha Garrison argued that "cases of sexual and technological conception should be governed by similar rules because, despite mechanical differences between these two reproductive methods, there are no significant differences in the parent-child relationships that they produce."[233] The difficulty both approaches face is that assisted reproduction has made it easier to create families that traditional family mores—and many states today—would deplore. Garrison may be right that the issue is the propriety of single father or same-sex parenthood rather than the use of artificial insemination, in vitro fertilization, or surrogacy,[234] but the differences over family form may ultimately be less tractable than those over technology.

Adoption has the potential to mediate these differences or be caught in the middle of them. The California courts observed:

> [Adoption is a] proceeding [that] is essentially one of contract between the parties whose consent is required. It is a contract of a very solemn nature, and for this reason the law has wisely thrown around its creation certain safeguards, by requiring, not only that it shall be entered into in the presence of a judge, but also that it shall receive

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[231] While the court in *K.M.* rejected the suggestion that it determined parentage by intent alone, it did consider the parties' intent to raise the child jointly as a critical factor in the decision. *See id.* at 680.

[232] *See generally* Bernstein, *supra* note 96.

[233] Marsha Garrison, *Law Making For Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 837 (2000).

[234] *See id.* at 882–90.

> his sanction, which is not to be given until he has satisfied himself of these three things: 1. That the person adopting is ten years older than the child. 2. That all the parties whose consent is required do consent, fully and freely, to the making of such contract. 3. That the adoption contemplated by the contract will be for the best interest of the child adopted.[235]

Elizabeth Cole adds that adoption "provide[s] children with nurturant environments in the care of legally recognized parents whose custody, control, responsibilities, and rights are assured."[236] These definitions unite two concepts: advancing children's interests through agreement of adults and securing legal recognition of parents whose "custody, control, responsibilities, and rights are assured."[237]

Adoption has thus served to place the imprimatur of the state on the transfer of parenthood, and to reassure the participants. Rickie Solinger has written eloquently about the role of adoption in the fifties as an institution reinforcing the sexual and family norms of that era.[238] Within that context, the state affiliated social worker was a visible part of the process.[239] Sandra Patton-Imani wrote, "The presence of a social worker is significant in adoption stories—she approves the adoptive parents and 'finds' the baby. She is the mediator for the state's definition of good parents."[240] The state role validated what might otherwise have been seen

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[235] Sharon S. v. Superior Court, 73 P.3d 554, 562 (Cal. 2003).

[236] Elizabeth S. Cole, *Adoption: History, Policy, and Program*, *in* A HANDBOOK OF CHILD WELFARE: CONTEXT, KNOWLEDGE, AND PRACTICE 640 (Joan Laird & Ann Hartman eds., 1985).

[237] *Id.*

[238] *See generally* SOLINGER, *supra* note 2.

[239] *Id.* at 32.

[240] Sandra Patton-Imani, *Redefining the Ethics of Adoption, Race, Gender, and Class*, 36 LAW & SOC'Y REV. 813, 814 (2002); *see also* Paula J. Manning, *Baby Needs a New Set of Rules: Using Adoption Doctrine to Regulate Embryo Donation*, 5 GEO. J. GENDER & L. 677, 712–13 (2004). Manning stated:

> All states require a determination of the fitness of prospective adoptive parents. Some states require a home study, an evaluation conducted and written by a licensed social worker to determine whether persons are suitable to become adoptive parents. During the home study process, the social worker interviews the prospective adoptive parents about their backgrounds, relationship, financial status, physical health and motives for pursuing adoption. The social worker also conducts a criminal background check, contacts the parties' references, and conducts one or more visits to the home. The parties are required

(*continued*)

as an unsavory process, with the social worker's image of bureaucratic regularity countering the stigma otherwise associated with the "immorality" of the birth mother and the infertility of the adoptive couple.[241]

Today, a seller's market exists for healthy white infants.[242] As a result, far more proactive birth mothers combine with agencies to screen adoptive parents.[243] Given the thoroughness of the inquiry, the ability of birth parents to choose among prospective parents, and the hostility toward gay, lesbian, and other nontraditional families, it is understandable why many of these families may be persuaded to avoid adoption in favor of the creation of a new child. As Susan Appleton observed, adoption cannot meet the demand for children, and for those who can create a child through other means, control of the process is an important consideration.[244]

The new model of assisted reproduction accordingly involves little patience with traditional adoption procedures. Consider, for example, women's use of artificial insemination. It is so easy to perform, and severance of the anonymous sperm donor's parental rights is so easy to accomplish that any insistence on adoption or adoption-like procedures would likely lead to widespread circumvention. Moreover, the consequent parentage decisions fit readily within existing family law. The woman who uses artificial insemination to conceive a child is indisputably the child's mother, biologically and legally, and every jurisdiction has found a way to ratify the consenting husband's parental role.[245] The net result is

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> to provide the social worker with their birth certificates, marriage certificates, divorce decrees, letters from employers, insurance policies, and statements from their physicians verifying they are in good health. The entire process is designed to ensure that the home is safe and that the parents are fit.

Id.

[241] *Id.*

[242] *See* SOLINGER, *supra* note 2, at 154 (indicating that after World War II, white, pregnant, unmarried women and their babies became market commodities).

[243] *See* Erika Lynn Kleiman, Comment, 30 COLUM. J.L. & SOC. PROBS. 327, 331 (1997).

[244] Appleton, *supra* note 6, at 428–29.

[245] That is, the artificial insemination of married women virtually always results in recognition of the parental status of the mother and her consenting husband. Artificial insemination of a single woman always results in recognition of her parentage, with jurisdictions splitting on the question of whether the sperm donor's parental status is severed, and only a few states recognizing the mother's unmarried partner. The modern trend also recognizes the parental status of an intended mother whose ovum is carried to term by a gestational surrogate, though the results are less uniform here. *See* discussion *supra* Part II.A.

not very different from the historic operation of the marital presumption. Formal adoption—and the corresponding imprimatur of the state—adds little to the process, and the states have overwhelmingly responded by either recognizing the mother's husband as the legal father without adoption, or ratifying the result after the fact.

Surrogacy presents more contentious issues. Before the advent of in vitro fertilization, a woman giving birth was necessarily the genetic mother and therefore recognized as a legal parent. With the separation of genetic and gestational motherhood, many commentators would still recognize the birth mother's substantial contribution to the child and argue that it entitles the birth mother to deference and respect.[246] This sets up the most emotionally charged of reproductive disputes—those between surrogates, who may or may not have status as legal parents, and intended parents, who may or may not have contributed their own sperm or egg to the child's conception.

Traditional adoption procedures are not designed to resolve parental status disputes, and they are too cumbersome to secure a transfer of parenthood in the face of uncertainty. If, as in the *Baby M* case, the gestational mother is a legal parent, then only adoption can transfer parentage, and under adoption law, that can only occur if the gestational mother does not withdraw consent after birth. If she does, adoption is irrelevant, and if she does not, it is practically unnecessary. Adoption thus provides an expensive and intrusive process that ratifies decisions that have already been made.

Conversely, if, as in *Johnson v. Calvert*, the intended parent who contributes his or her own genetic material is a legal parent, then adoption is unnecessary and potentially insulting. Moreover, for many intended parents using surrogacy, particularly those contributing their own genetic material, privacy may be more important than state sanction.

To deal with these concerns, the UPA of 2002 defines the legal mother of the child as the woman giving birth, absent judicial approval of a gestational agreement before conception.[247] To receive such approval,

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[246] *See* E. Gary Spitko, *The Constitutional Function of Biological Paternity: Evidence of the Biological Mother's Consent to the Biological Father's Co-Parenting of Her Child*, 48 ARIZ. L. REV. 97, 104 (2006). Some courts have taken a similar approach. *See, e.g.*, *In re* C.K.G., 173 S.W.3d 714 (Tenn. 2005) (treating gestation as an important issue in a dispute between a genetic father and his unmarried partner, who gave birth to his children using donated eggs with the intention that they would jointly parent the children).

[247] UNIF. PARENTAGE ACT § 201(a)(1) (amended 2002), 9B U.L.A. 15 (Supp. 2006), *available at* http://www.law.upenn.edu/bll/ulc/upa/final2002.htm#TOC1_15nn. Alta Charo

(*continued*)

courts must conduct a home study of the intended parents, find that all parties to the agreement understand its terms, and find that the intended parents "meet the standards of suitability applicable to adoptive parents."[248] If they successfully complete these procedures, which are at least as onerous as those involved in adoption, the court can approve the agreement and establish parental standing of the intended parents at the time of conception.[249] The problem with the UPA of 2002 is that it requires legislatures to explicitly provide for, and therefore ratify, gestational surrogacy.[250] Not all legislatures are willing to do so.[251] To maximize the likelihood of approval, the original UPA proposed in 2000 limited the procedure to married couples and gestational surrogates who were not genetically related to the child.[252]

These cases, however, address the circumstances in which existing law is most likely to recognize the intended parents as legal parents without adoption. So the provision treating the gestational surrogate as the legal parent is essential to persuade prospective parents to invoke the procedure. Yet, it is not clear that courts will follow the legislation in the event of a dispute. The provision would overrule *Johnson v. Calvert*,[253] perhaps the most prominent of the surrogacy decisions under the UPA of 1973, and it would contradict the recent Pennsylvania decision in *J.F. v. D.B.*,[254] which held that a gestational surrogate has no legal standing to seek custody as a parent.[255] Moreover, at least three of the seven states to adopt the act deleted the provision that addressed gestational agreements.[256] Conservative states remain reluctant to authorize surrogacy explicitly,[257] and states more willing to recognize surrogacy already recognize genetic parents commissioning surrogates as legal parents without the UPA of

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noted that most countries in the world recognize the woman who gives birth to a child as the child's mother. *See* Charo, *supra* note 176.

[248] UNIF. PARENTAGE ACT § 803(b)(2).

[249] *Id.* § 803(a).

[250] *See id.* § 801.

[251] *See supra* note 150 and accompanying text (noting that some states have banned surrogacy outright).

[252] UNIF. PARENTAGE ACT § 801(b).

[253] 851 P.2d 776, 782 (Cal. 1993) (upholding the validity of a surrogacy agreement and declaring the intended parents the legal parents).

[254] 897 A.2d 1261 (Pa. Super. Ct. 2006).

[255] *Id.* at 1273. *But see* Appleton, *supra* note 228, at 281 (maintaining that the UPA's rule—gestational mothers are legal mothers of the children that they birth—is the emerging default rule).

[256] *See* sources cited *supra* note 167 and accompanying text.

[257] *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-218 (West 2000); D.C. CODE § 16-402 (2001).

2002.[258] So it remains to be seen whether the statute can lock in acceptance of adoption-like procedures by guaranteeing certainty in the definition of parentage at the time of conception.[259]

Unmarried partners without a genetic connection to the child face even more difficulty securing recognition of their parental status. The National Conference of Commissioners on Uniform State Laws (NCCUSL) changed the UPA in 2002 to eliminate the restriction to married couples, though it still requires that the "man and the woman who are the intended parents must both be parties to the gestational agreement," suggesting that the agreements are limited to heterosexual couples.[260] The statute does not mention gay and lesbian couples, and, because of the "man and woman" requirement, it cannot be used to sever the parental status of gestational surrogates who contract to give birth to a baby conceived with sperm from an intended single father.[261]

Moreover, even though the law has generally not permitted genetic fathers to exclude the women who have raised their children,[262] unmarried fathers encounter more skepticism when mothers seek to contest their

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[258] *See, e.g.*, J.F. v. D.B., 848 N.E.2d 873 (Ohio Ct. App. 2006).

[259] The statutes may be more effective if fertility clinics or other agencies insist that their clients follow the procedures. The clinics, however, may be more inclined to locate in jurisdictions that are friendlier to the procedures in the first place. *See* June Carbone & Paige Gottheim, *Markets, Subsidies, Regulation, and Trust: Building Ethical Understandings into the Market for Fertility Services*, 9 J. GENDER RACE & JUST. 509, 515–21 (2006).

[260] UNIF. PARENTAGE ACT § 801(b) (amended 2002), 9B U.L.A. 56 (Supp. 2006). The comment to this section explains:

> Under subsection (b), a valid gestational agreement requires that the man and woman who are the intended parents, whether married or unmarried, to be parties to the gestational agreement. This reflects the Act's comprehensive concern for the best interest of nonmarital as well as marital children born as the result of a gestational agreement. Throughout UPA the goal is to treat marital and nonmarital children equally.

Id. at 57.

[261] Presumably, however, the surrogate's status would be terminated if the single father entered into the agreement with a female partner.

[262] See discussion *supra* Part II.B of *Doe v. Doe* (recognizing genetic the father and his wife as parents, rather than the traditional surrogate, even without adoption), *Buzzanca v. Buzzanca* (recognizing intended parents, despite the lack of adoption), and *In re C.K.G.*, 173 S.W.3d 714, 733 (Tenn. 2005) (upholding maternal status of unmarried woman who gave birth to children using donated eggs and her partner's sperm).

relationship to children. Until *Stanley v. Illinois*,[263] the states often limited legal recognition of unmarried genetic fathers, regardless of their actual relationship with their children.[264] Justice Cordy, in his dissent from the Massachusetts decision recognizing gay marriage, explained,

> Whereas the relationship between mother and child is demonstratively and predictably created and recognizable through the biological process of pregnancy and childbirth, there is no corresponding process for creating a relationship between father and child. Similarly, aside from an act of heterosexual intercourse nine months prior to childbirth, there is no process for creating a relationship between a man and a woman as the parents of a particular child. The institution of marriage fills this void by formally binding a husband-father to his wife and child, and imposing on him the responsibilities of fatherhood.[265]

Surrogacy, at least when it involves a single father and a gestational surrogate, potentially involves a conflict between a father, who has practically contributed little to the child besides his sperm, and a gestational mother, who has carried the child for nine months and may have developed a significant bond. *Baby M*, of course, involved this type of conflict,[266] and the recent case of *J.F. v. B.D.* dramatically illustrates the issue.[267] The trial court could be skeptical of the well-educated genetic father, who went through a great deal of difficulty to secure the birth of triplets, because he did not arrange for a legal mother to be part of the agreement.[268] Without the UPA provisions that allow severance of the surrogate's parental rights before birth, adoption is of little help. The father's partner did intend to adopt,[269] but because the adoption could not occur until after the birth of the children, it could not eliminate uncertainty about the surrogate's status nor terminate the parental rights of others in time to avoid the dispute. Even though Ohio and Pennsylvania courts have

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[263] 405 U.S. 645 (1972) (striking down a state law that automatically made children of unmarried men wards of the state without a hearing on the father's qualifications).

[264] *See* Lynn Kirsch, *Unwed Fathers and Their Newborn Children Placed for Adoption: Protecting the Rights of Both in Custody Disputes*, 36 ARIZ. L. REV. 1011, 1013 (1994).

[265] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 996 (Mass. 2003) (Cordy, J., dissenting).

[266] *In re* Baby M, 537 A.2d 1227, 1235 (N.J. 1988).

[267] *See* J.F. v. D.B., 897 A.2d 1261, 1277–80 (Pa. Super. Ct. 2006).

[268] J.F. v. D.B., 66 Pa. D & C.4th 1, 19 (2004).

[269] *J.F.*, 897 A.2d at 1268 n.9.

resolved the issue (at least for now) by concluding that a gestational surrogate does not have parental status,[270] the issue remains open in many states. To the extent that the law recognizes either an ovum donor or a gestational surrogate as a parent by virtue of her biological contribution to the process, only a statutory procedure can secure termination of parental rights prebirth, and adoption under either the UPA of 2002 or after birth does not address the needs of a genetic father who wants to raise a child on his own.

Conversely, the group with the least secure parental status and the ones most likely to benefit from adoption are the partners of a genetic parent, especially if they are not married. One in two marriages end in divorce,[271] and unmarried cohabitants and same-sex couples are more likely to split than married heterosexual couples.[272] When that happens, one partner may attempt to use the other's lack of a biological tie to the child as a lever in child custody or support disputes.[273] Moreover, even though the courts have overwhelmingly ruled against fathers who have tried to exclude their former wives from a maternal role the father encouraged, [274] the outcome in conflicts between unmarried, same-sex partners is less predictable.

First, the conflicts are harder to avoid through precautions. Effective screening more readily identifies surrogates able to fulfill gestational agreements than intimate partners able to part without dispute.

Second, where partnership conflicts involve a dispute between a legal, genetic parent and a nonparent who has played a parental role, the law in many states does not recognize the nonparent's standing to seek custody or visitation.[275] Cases involving assisted reproduction may be legally no

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[270] *See supra* note 208 and accompanying text.

[271] *See* Lydia Saad, Divorce Doesn't Last, Gallup Poll (Mar. 30, 2004), http://www.galluppoll.com/content/Default.aspx?ci=11161.

[272] DR. ANNE-MARIE AMBERT, VANIER INST. OF THE FAMILY, SAME-SEX COUPLES AND SAME-SEX-PARENT FAMILIES: RELATIONSHIPS, PARENTING, AND ISSUES OF MARRIAGE 4 (2005), *available at* http://www.vifamily.ca/library/cft/samesex_05.html.

[273] David Margolick, *Lesbian Child-Custody Cases Test Frontiers of Family Law*, N.Y. TIMES, July 4, 1990, at 1.

[274] See earlier discussion of *Doe v. Doe*, *supra* Part II.B, (recognizing genetic father and his wife, rather than traditional surrogate, even without adoption), *Buzzanca v. Buzzanca*, *supra* Part II.B, (recognizing intended parents despite lack of adoption), and *In re C.K.G.*, 173 S.W.3d 714 (2005) (upholding maternal status of unmarried woman who gave birth to children using donated eggs and her partners' sperm).

[275] *See generally* P.B. v. T.H., 851 A.2d 780 (N.J. Super. Ct. App. Div. 2004) (holding that a neighbor, who had assisted in raising a child, had no standing to seek custody of the child); *In re* Thompson, 11 S.W.3d 913 (Tenn. Ct. App. 1999) (finding that a biological mother's lesbian partner did not have standing to seek visitation of the child, even though the partner was involved in and supported the artificial insemination). *But see* J.A.L. v.

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different from disputes that arise when a cohabitant or step-parent moves in with a partner who has a child from a previous relationship.[276]

Third, best interest determinations, which may be unpredictable in the best of circumstances, tend to incorporate underlying notions of family regularity. If the state seeks to promote married, heterosexual households as the best circumstances in which to raise children, it may interpret a child's interest as better outside of a lesbian or unmarried family, even if the child has deeply bonded with the other partner.[277]

Finally, the Supreme Court's decision in *Troxel v. Granville*, which held a visitation statute unconstitutional to the extent that it compelled grandparent visitation without deference to a fit mother's wishes,[278] may deter courts from recognizing the visitation claims of nonparents.

Nontraditional partners who desire recognition of their joint parental status may find adoption the only certain way to secure recognition. Unlike genetic partners who wish to secure severance of the gestational surrogate's parental rights, functional parents do not need prebirth procedures, and their access to adoption does not depend therefore on new legislation addressing assisted reproduction. And even though surrogates are most likely to change their minds, if at all, in the immediate post-birth process critical to adoption, genetic parents are most likely to consent to their partners' adoption in that same critical period. Traditional adoption thus offers its most attractive advantages, at least in the context of assisted reproduction, to untraditional partners who wish to use adoption to lock in legal recognition of their families. Moreover, even in states that may be willing to confer civil union or de facto parent recognition to unmarried partners, federal and interstate recognition remain in doubt, if not unavailable. Partnership recognition may become a more critical part of

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E.P.H., 682 A.2d 1314 (Pa. Super. Ct. 1996) (finding that the biological mother's lesbian partner had standing to seek partial custody of the child that the two women had raised together).

[276] For a discussion on step-parents' rights, see Sarah H. Ramsey, *Constructing Parenthood for Stepparents: Parents by Estoppel and De Facto Parents Under the American Law Institute's Principles of the Law of Family Dissolution*, 8 DUKE J. GENDER L. & POL'Y 285, 300 (2001) (summarizing the law with respect to step-parents and comparing American Law Institute Principles).

[277] For scholarly support of this view, see Lynn D. Wardle, *A Critical Analysis of Interstate Recognition of Lesbigay Adoptions*, 3 AVE MARIA L. REV. 561, 616 (2005); Lynn D. Wardle, *Parentlessness: Adoption Problems, Paradigms, Policies, and Parameters*, 4 WHITTIER J. CHILD & FAM. ADVOC. 323, 332–33 (2005). *But see* Carlos A. Ball & Janice Farrell Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253, 338–39 (1998).

[278] Troxel v. Granville, 530 U.S. 57, 67 (2000).

adoption in the context of assisted reproduction than the transfer of parenthood more commonly associated with adoption procedures.

B. Which Parents Will the State Recognize?

If unmarried partners may be the most willing to seek adoption in the context of assisted reproduction, the issue remains whether the states will be willing to recognize them. As the drafting history of the UPA indicates, many legislatures remain hostile to same-sex couples, skeptical of single parents, and reluctant to recognize unmarried heterosexual partners, in spite of constitutional guarantees that nonmarital children be treated equally. How can nontraditional parents secure a state imprimatur if the state is unwilling to say that it approves?

The answer lies with the difference between legislative and judicial action. Legislation creates a more general framework for parenthood; courts resolve particular cases. The legislature in a state can be unwilling to sanction the principle of unmarried parenthood, but at the same time a court in the same state may have no trouble allowing a specific individual to adopt the child of the partner with whom she planned the conception.

California provides an illustration. California's adoption statute does not limit adoption to married couples or a man and a woman. It requires only that the adoptive parent sever the parental status of the biological parent.[279] An early case raised the issue of whether a step-parent could adopt without terminating the parental rights of both biological parents.[280] The California Supreme Court concluded in the step-parent example, and again with respect to same sex couples, "[N]othing . . . prohibits the parties to an independent adoption from waiving the benefits of section 8617 when a birth parent intends and desires to coparent with another adult who has agreed to adopt the child and share parental responsibilities."[281] In other words, in the face of a statute without express statutory language (and therefore without a potentially divisive legislative fight about the acceptability of an unmarried adoptive parent), the courts concluded that the availability of adoption turned on the consent of the adults and the child's interests.[282]

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[279] *See* CAL. FAM. CODE § 8617 (West 2004) ("The birth parents of an adopted child are, from the time of the adoption, relieved of all parental duties towards, and all responsibility for, the adopted child, and have no right over the child.").

[280] *See* Marshall v. Marshall, 239 P. 36, 37–38 (Cal. 1925).

[281] Sharon S. v. Superior Court, 73 P.3d 554, 561 (Cal. 2003).

[282] *Id.* at 562.

The result has been a case-by-case extension of adoption practices. The initial litigation over step-parent adoption occurred in 1925.[283] California never limited the procedures to married couples,[284] and the court began to recognize second-parent adoption by a second parent of the same sex in the last couple of decades.[285] By the time the issue reached the California Supreme Court, between ten thousand and twenty thousand children had been adopted by same-sex partners.[286] The court was understandably concerned that anything short of ratification of the longstanding adoption practices would destabilize the legal status of thousands of families.[287]

California has not been alone in tailoring adoption practices to the needs of the families coming to court. Even though only three states statutorily allow for second-parent adoption by same-sex couples, appellate courts in six states and trial courts in fifteen additional states have expressly permitted it.[288] Of the twenty-six remaining states, only four (Colorado, Wisconsin, Nebraska, and Ohio) explicitly disallow it.[289] In addition, Florida bars all adoption by gays and lesbians, Mississippi bans adoption by same-sex couples, and Utah bans adoption by unmarried, cohabiting couples.[290]

The polarization over same-sex marriage and marriage movement initiatives to distinguish between married and unmarried couples has raised the stakes of legislative action on these issues. Adoption cases, in contrast, like cases of assisted reproduction that address the parentage of older

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[283] *Marshall*, 239 P. at 36.

[284] *Sharon S.*, 73 P.3d at 569.

[285] *See id.* at 573.

[286] *Id.* at 568.

[287] *Id.* at 568 & n.14.

[288] Jeffrey A. Dodge, Note, *Same-Sex Marriage and Divorce: A Proposal for Child Custody Mediation*, 44 FAM. CT. REV. 87, 91 (2006).

[289] *Id.* at 91 & n.48; *see also In re* T.K.J., 931 P.2d 488, 496 (Colo. Ct. App. 1996) (holding that Colorado's adoption statute limited step-parent adoption to married couples); *In re* Adoption of Luke, 640 N.W.2d 374 (Neb. 2002) (holding that child was not eligible for adoption by the biological mother's companion under the state's adoption statutes); *In re* Doe, 719 N.E.2d 1071 (Ohio Ct. App. 1998) (holding that step-parent adoption statute did not allow the biological mother's lesbian partner to adopt the children without terminating the parental rights of the biological mother by operation of law); *In re* Angel Lace M., 516 N.W.2d 678 (Wis. 1994) (holding that adoption by the biological mother's female cohabitant was not permitted under the state's adoption statute, despite the trial court's finding that it would be in the best interest of the child).

[290] Storrow, *supra* note 126, at 340.

children, present courts with established families.[291] Jurisdictions that would reject same-sex marriage out of hand, or which would clearly prefer two-parent married families in the abstract, are often willing to ratify existing parental relationships that serve children's interests.[292] Adoption, at least so long as it stays out of the glare of publicity, offers more flexible recognition of diverse family arrangements than more formal institutions, such as marriage.

At the same time, adoption can be an attractive institution to cement new family ties. Unlike marriage, it comes with relatively little ideological context or association with fixed (and in the minds of some discredited) meanings.[293] Unlike domestic partnerships and civil unions, however, it does carry symbolic and emotional weight. The commitment it embodies, symbolically and legally, is the joyful one of parent to child. For those who cannot otherwise secure public recognition of the family they are creating, adoption offers a potentially attractive option. Adoption may thus serve more effectively to secure recognition of a partner than of the initial legal parent involved in assisted reproduction.

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[291] Indeed, the number of gay and lesbian families raising children has substantially increased. *See* T. Shawn Taylor, *Ties that Unwind: Legal Cases and Some State Laws Threaten to Undo Lesbian Couples' Adoptions, Parental Arrangements*, CHI. TRIB., Nov. 17, 2004, at 1. According to 2000 U.S. Census data, 34% of lesbian couples and 22% of gay male couples are raising children under the age of 18, in comparison with 19.5% of lesbian couples and 5% of male couples in 1990. *Id.*

[292] In addition, states that would deny adoption because of the alleged illegality of same-sex conduct have a more difficult time doing so after *Lawrence*. *See, e.g.*, Family Law Prof Blog (June 10, 2006), http://lawprofessors.typepad.com/family_law/2006/week23/index.html. Once Missouri, for example, repealed its longstanding ban on same-sex behavior, the Missouri Attorney General announced that the state no longer had grounds for opposing the grant of a foster-care license to a lesbian who wished to raise the child with her partner. *Id.*; *see also* Dep't of Human Servs. and Child Welfare Agency Review Bd. v. Howard, No. 05-814, 2006 WL 1779467 (Ark. June 29, 2006) (overturning regulatory ban on gay and lesbian foster parents on the ground that there is no relationship between a blanket ban on homosexual foster parents and the health, safety, and welfare of foster children).

[293] *See, e.g.*, Paula L. Ettelbrick, *Domestic Partnership, Civil Unions, Or Marriage: One Size Does Not Fit All*, 64 ALB. L. REV. 905 (2001) (questioning whether lesbians should embrace marriage as an appropriate institution to govern their relationships); Paula L. Ettelbrick, *Since When is Marriage a Path to Liberation?*, OUT/LOOK, NAT'L GAY & LESBIAN Q. No. 6 (Fall 1989), *reprinted in* LESBIAN AND GAY MARRIAGE: PRIVATE COMMITMENTS, PUBLIC CEREMONIES 20–26 (Suzanne Sherman ed., 1992).

IV. INTERSTATE RECOGNITION: THE NEXT BATTLE IN THE CULTURE WARS

If the construction of alternative families were to proceed on the same terms as the use of artificial insemination, it would continue to take place under the public radar, one family at a time, until general public acceptance reached the point where the newer arrivals could be incorporated into a comprehensive approach to family law. And in some states, that is essentially what has taken place.[294]

In the country as a whole, however, a deep polarization has occurred over the recognition of same-sex couples and their families.[295] President George W. Bush championed a constitutional amendment defining marriage as a relationship between a man and woman, and editorial writers blamed Justice Kennedy's *Lawrence* opinion for threatening states' ability to resolve the issue without the intrusion of the federal courts.[296] This splintering involves a reaffirmation in some parts of the country of the unity of sex, marriage, and procreation as the foundation of family.[297] Within this context, Lynn Wardle argued for what he termed "the imitative model of adoption,"[298] which serves to replicate the traditional two-parent, procreative family in order to serve children's interests. This emphasis, however, is at odds with the "facts on the ground." One third of all U.S. births are now nonmarital, and growing numbers of single parents and same-sex couples are choosing to construct alternative families.[299] The result has been increased uncertainty in the determination of parenthood.[300] Adoption may offer the most promising vehicle for some measure of uniformity, precisely because it recognizes extant parent-child relationships without directly sanctioning the underlying intimate partnerships.

Those states willing to recognize same-sex unions have been moving toward incorporating parentage determinations into the establishment of

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[294] *See* discussion *supra* notes 169–76 and accompanying text (discussing the state of the law in California).

[295] Opinion, *Justice Kennedy's Cuture War*, WALL ST. J., June 7, 2006, at A14.

[296] *Id.*

[297] *Id.*

[298] Wardle, *supra* note 12, at 565.

[299] *See* Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFF. L. REV. 341, 342 (2002) ("[A]pproximately ten million children are being raised by same-sex parents in the United States . . . . [O]ur country is undergoing a 'gayby boom.'").

[300] *See id.*

partnership status.[301] Accordingly, same-sex marriage in Massachusetts, civil unions in Vermont, domestic partnerships in California, and similar legislation in other states would all extend the marital presumption to these relationships.[302] While the limits of the new doctrine have not been fully determined,[303] these states appear likely to conclude that the birth of a child within such a union confers parental status on both partners as a matter of state law without any further action. For these jurisdictions, recognition of same-sex parentage has entered the public square in ways that are deeply threatening to those states that continue to insist on public disapproval. The state provisions that confer explicit approval of same-sex unions face the greatest difficulty in securing either federal or interstate recognition.[304]

Miller-Jenkins v. Miller-Jenkins drives home the issue.[305] Lisa and Janet, who lived in Virginia, entered into a civil union in Vermont.[306] Lisa gave birth to a child, Isabella, through artificial insemination.[307] Four months after the birth, Lisa, Janet, and Isabella, moved to Vermont.[308] Lisa and Janet split a year later, and Lisa returned with Isabella to Virginia.[309] Lisa filed for dissolution of the civil union in Vermont.[310] The Vermont court issued "a Temporary Order giving Janet 'parent-child contact,'" and requiring that Lisa, whom David Wagner described as "living in Virginia and flat broke," take Isabella to Vermont to spend the third week of each month with Janet.[311] Lisa then filed an action in Virginia asking the courts to recognize her as Isabella's sole parent.[312] The Virginia court did so, concluding that Lisa was Isabella's biological parent, and Virginia's "Marriage Affirmation Act" (Virginia Code section 20-45.3) provided that a civil union "or other arrangement" between a same-sex couple is prohibited, and that any such union entered into in another state "shall be

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[301] *See* Appleton, *supra* note 228, at 240–41.

[302] *Id.*

[303] See *id.* for a thoughtful exploration of the issues likely to arise.

[304] *See id.* at 290; Deborah L. Forman, *Interstate Recognition of Same-Sex Parents in the Wake of Gay Marriage, Civil Unions, and Domestic Partnerships*, 46 B.C. L. REV. 1, 17–18 (2004).

[305] *See generally* Rachel E. Shoaf, Note, *Two Mothers and Their Child: A Look at the Uncertain Status of Nonbiological Lesbian Mothers Under Contemporary Law*, 12 WM. & MARY J. WOMEN & L. 267 (2005) (detailing the facts and laws involved in *Miller-Jenkins*).

[306] David M. Wagner, *A Vermont Civil Union and a Child in Virginia: Full Faith and Credit?*, 3 AVE MARIA L. REV. 657, 658 (2005).

[307] *Id.*

[308] *Id.*

[309] *Id.*

[310] *Id.*

[311] *Id.* at 659.

[312] *Id.*

void in all respects in Virginia and any contractual rights created thereby shall be void and unenforceable."[313] The court also ruled that it did not have to defer to the Vermont court's jurisdiction because Janet was not a "person acting as a parent" under Virginia law.[314] The Vermont court responded by affirming its jurisdiction, and concluding that Janet had legal status as a parent on the same terms as the husband of a woman conceiving through use of artificial insemination.[315] The parties filed appeals in both states. The Supreme Court of Vermont, which upheld the Vermont courts' jurisdiction under the Uniform Child Custody Jurisdiction Act (UCCJA)[316] and the Parental Kidnapping Prevention Act (PKPA),[317] found Lisa in contempt for violating the temporary visitation order.[318] A petition for certiorari was filed with the Supreme Court of the United States on February 7, 2007.[319] The intermediate appellate court in Virginia agreed that the PKPA barred its exercise of jurisdiction, and accordingly, it vacated the orders of the trial court and remanded the case "with instruction to grant full faith and credit to the custody and visitation orders of the Vermont court."[320] An appeal to the Virginia Supreme Court appears likely.[321]

The *Miller-Jenkins* case illustrates the continuing uncertainty that underlies recognition of parental partnerships, and the potential advantages of adoption over civil unions or marriage in securing interstate recognition. The appellate victories in Vermont and Virginia both stemmed from an accident of timing, viz., the Vermont court's initial assertion of jurisdiction.[322] If Lisa had been able to secure jurisdiction in Virginia, the same jurisdictional principles that produced deference to the Vermont decision might have instead compelled deference to the Virginia courts.[323]

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[313] *Id.* at 660 n.23.

[314] *Assisted Conception—Custody Jurisdiction: Opposing Courts Decide Parentage of Child Born Via AI During Civil Union*, 31 Fam. L. Rep. (BNA) 1051 (Nov. 30, 2004).

[315] *Id.*

[316] VT. STAT. ANN. tit. 15, §§ 1031–1051.

[317] 28 U.S.C. § 1738A (2000).

[318] Miller-Jenkins v. Miller-Jenkins, 912 A.2d 951, 956 (Vt. 2006).

[319] Miller-Jenkins v. Miller-Jenkins, Docket for 06-1110, http://www.supremecourtus.gov/docket/06-1110.htm (last visited May 6, 2007).

[320] Miller-Jenkins v. Miller-Jenkins, 637 S.E.2d 330, 338 (Va. 2006).

[321] Virginia Court Cedes Lesbian Custody Battle to Vermont (Nov. 28, 2006), http://www.365gay.com/Newscon06/11/112806custody.htm.

[322] *See Miller-Jenkins*, 912 A.2d at 956.

[323] The United States Supreme Court has interpreted the Parental Kidnapping Prevention Act to provide, "Once a State exercises jurisdiction consistently with the

(*continued*)

Virginia's obligation to recognize the Vermont court's assertion of jurisdiction stands on more firmly established ground than any obligation to recognize a civil union from another state.

Adoption decrees, like custody decrees, are court orders and may be entitled to full faith and credit.[324] Marriages and civil unions stand on different grounds with respect to interstate recognition.[325] Therefore, until a court acts, they may provide little security for parental partners. First, the longstanding rule with respect to interstate recognition of interstate marriages has been that marriages valid where performed are valid everywhere, *unless the marriage violates the strong public policy of the state.*[326] Although scholars have disagreed as to whether this doctrine permits states to deny interstate recognition of same-sex unions, many states have taken the position that same-sex relationships clearly violate strongly held public policies.[327] Indeed, Lisa filed the Virginia action on the day a new Virginia statute rejecting same-sex marriage and civil unions became effective, and in the context of this case, Janet's parental status depended entirely on recognition of the validity of the Vermont civil union.[328]

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provisions of the Act, no other State may exercise concurrent jurisdiction over the custody dispute, § 1738A(g), even if it would have been empowered to take jurisdiction in the first instance, and all States must accord full faith and credit to the first State's ensuing custody decree." Thompson v. Thompson, 484 U.S. 174, 177 (1987) (citation omitted).

[324] *See* Robert G. Spector, *The Unconstitutionality of Oklahoma's Statute Denying Reocgnition to Adoptions by Same-Sex Couples from Other States*, 40 TULSA L. REV. 467, 474–77 (2005).

[325] For a discussion on the interstate recognition of marriages and civil unions, see generally Emily J. Sack, *Civil Unions and the Meaning of the Public Policy Exception at the Boundaries of Domestic Relations Law*, 3 AVE MARIA L. REV. 497 (2005).

[326] *See* Deborah L. Forman, *Married with Kids and Moving: Achieving Recognition for Same-Sex Parents Under the Uniform Parentage Act*, 4 WHITTIER J. CHILD & FAM. ADVOC. 241, 248–49 (2005).

[327] *See* Wardle, *supra* note 12, at 567–68; *see also* Mark D. Rosen, *Why the Defense of Marriage Act is Not (Yet?) Unconstitutional:* Lawrence*, Full Faith and Credit, and the Many Societal Actors that Determine What the Constitution Requires*, 90 MINN. L. REV. 915, 933–34 (2006).

[328] *See* EqualityVirginia, FAQ: Miller-Jenkins v. Miller-Jenkins, http://www.equalityvirginia.org/site/pp.asp?c=dfIIITMIG&b=262607 (last visited Feb. 23, 2007) (observing that the case was filed on the date that the Virginia Affirmation of Marriage Act became effective). The case may turn, however, on the jurisdiction question of which court has the power to decide the issue. *See id.* Even though the Vermont court had not issued a final ruling, it had exercised jurisdiction over the dispute. *Id.* The Virginia court maintained that the Affirmation of Marriage Act granted it jurisdiction to hear the case, even though Virginia, Vermont, and federal law all prohibited its jurisdiction. *Id.*

Second, the Defense of Marriage Act has affirmed state power to deny recognition of same-sex unions.[329] This presumably includes determinations of parentage that follow from the existence of such unions.[330] Even though the federal legislation would not be sufficient to overcome a conclusion that the Constitution compelled recognition,[331] it expresses the congressional view that the Constitution should be interpreted in accordance with the long line of cases permitting the states to deny recognition to marriages at odds with their strong public policy, and it carries with it the implicit threat that Congress might respond to court action imposing same-sex marriage on the states by enacting a constitutional amendment overturning the decision.[332]

Third, the question of which state has jurisdiction may be complex and difficult to predict in advance. Lisa and Janet initially lived in Virginia,

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[329] *See* 28 U.S.C. § 1738C (2000). The statute provides:

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

Id.

[330] *See* Lisa S. Chen, Comment, *Second-Parent Adoptions: Are They Entitled to Full Faith and Credit?*, 46 SANTA CLARA L. REV. 171, 190–91 (2005). Lisa Chen observed:

> The enactment of DOMA may also permit states to refuse recognition of second-parent adoptions that result from a same-sex couple's relationship, such as a civil union or domestic partnership. Although DOMA only allows states to refuse recognition of rights arising under a same-sex marriage, it is possible that a civil union or domestic partnership can be likened to a marriage. Therefore, adoptions that result from a civil union or domestic partnership may be negated by DOMA.

Id.

[331] For an argument that Congress did not possess the constitutional authority to pass the Defense of Marriage Act, see Mark Strasser, Baker *and Some Recipes for Disaster: On DOMA, Covenant Marriages, and Full Faith and Credit Jurisprudence*, 64 BROOK. L. REV. 307, 350 (1998). *But see* Lynn D. Wardle, *Non-Recognition of Same-Sex Marriage Judgments Under DOMA and the Constitution*, 38 CREIGHTON L. REV. 365, 371 (2005) (arguing that Congress had the power to enact DOMA). *See also* Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 255, 391–92 (1998).

[332] *See* William C. Duncan, *Revisiting State Marriage Recognition Provisions*, 38 CREIGHTON L. REV. 233, 268–69 (2005).

entered into a civil union in Vermont, moved back to Virginia, became domiciled in Vermont, and separated, with one party staying in Vermont and the other moving to Virginia.[333] Had both been in Virginia at the time of the breakup, Virginia courts, who are unlikely to recognize the validity of the civil union, would have had jurisdiction.[334] And, indeed, if Lisa had filed in Virginia before the Vermont court acquired jurisdiction, her case might have been resolved differently.[335] The Virginia appellate court, in its decision upholding Vermont's jurisdiction, emphasized that *Lisa* had initially filed in Vermont, acknowledging Janet's parentage.[336] It decided

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[333] Miller-Jenkins v. Miller-Jenkins, 637 S.E.2d 330, 332 (Va. 2006).

[334] Under the Virginia version of the Uniform Child Custody Jurisdiction and Enforcement Act, a state court can assert jurisdiction to enter a custody decree "if the child's home is or recently has been in the State, if the child has no home State and it would be in the child's best interest for the State to assume jurisdiction, or if the child is present in the State and has been abandoned or abused." *Id.* at 333–34 (quoting Thompson v. Thompson, 484 U.S. 174, 177 (1987)).

[335] This raises the question, however, of *when* the child's home would be in Virginia for purposes of jurisdiction. Virginia's version of the UCCJA defines a child's home state as "the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding." VA. CODE ANN. § 20-146.1 (2004). The six month extension of home state jurisdiction continues so long as "a parent or person acting as a parent" remains in the initial home state. *See id.* Accordingly, Vermont should have been the home state for six months after Lisa moved to Virginia, and the Virginia courts should have deferred to Vermont so long as they recognized Janet as "a parent or person acting as a parent." Virginia law defines person acting as a parent as a person with physical custody, and defines physical custody as "physical care and supervision of a child." *Id.* Accordingly, the Virginia courts should have deferred to Vermont's jurisdiction for six months without necessarily recognizing the civil union, but it remains to be seen whether it would actually do so.

The Parental Kidnapping Prevention Act would further recognize Vermont as the child's home state if she lived there "within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State." 28 U.S.C. § 1738A(c)(2)(A) (2000). Virginia modified the language to provide that Virginia would have jurisdiction of any child living in the state at the time the action was filed unless "a parent or person acting as parent" rather than a "contestant" remained in the initial home state. *See* VA. CODE ANN. § 20-146.1 cmt. (2004). The notes to the section give the example of a grandparent, who lives in the initial home state and wishes to seek visitation. That grandparent would not be a "parent or person acting as a parent" and could accordingly not prevent the Virginia court acquiring jurisdiction over a child whose parent had recently moved to Virginia. VA. CODE ANN. § 20-146.1 cmt. 1. The official comments note that the PKPA permits the states to narrow the scope of jurisdiction, but the courts in *Miller-Jenkins* have not addressed the validity of this provision.

[336] *Miller-Jenkins*, 637 S.E.2d at 335 ("Lisa makes this contention despite the fact that she alleged in her 'Complaint for Civil Union Dissolution' that IMJ was 'the biological or

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the case on the relatively narrow ground that the Parental Kidnapping Prevention Act prevented the Virginia trial court from exercising jurisdiction over the case after Vermont had already assumed jurisdiction in accordance with the action Lisa filed.[337] The result, at this point, with appeals not yet exhausted, resolves only the question of respect for the Vermont court's exercise of jurisdiction with both parties' express consent.

This case, however it ends, will not resolve the enormous uncertainty intact families face.[338] If a parent who is not recognized as a legal parent travels cross-country with a child, will she be able to authorize medical care in the event of an accident? Can she arrange for a passport for an overseas trip? Can she see the child if the child is hospitalized? The results of such uncertainties can be draconian and traumatic for all involved.

The same concerns may attend de facto parents in those jurisdictions that recognize parentage on the basis of function.[339] The California cases that have recognized the parental standing of a partner who welcomes the child into the household and holds out the child as her own, for example, do not set a time limit.[340] In the event of a dispute, the courts may recognize parentage after the fact, but the prospect of such a ruling in the future cannot compel recognition on a cross-country trip or in another state that does not recognize de facto parentage. Until a judgment is issued, there is nothing for another state, which may have jurisdiction over a dispute because the parties have moved there, to recognize.

Adoption, in contrast, should establish a judgment entitled to recognition under the Full Faith and Credit Clause.[341] Adoptions, unlike

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adoptive child[] of said civil union,' and despite the fact that the Vermont court in its June 17, 2004 order specifically found that IMJ was 'the minor child of the parties.'").

[337] *Id.* at 337. Compare the Vermont Supreme Court's conclusion that it had exclusive jurisdiction. Miller-Jenkins v. Miller-Jenkins, 912 A.2d 951, 958 (Vt. 2006).

[338] *See* Sack, *supra* note 325, at 518–19; Shoaf, *supra* note 305, at 295.

[339] *See supra* note 131 and accompanying text.

[340] *See supra* notes 225–27 and accompanying text.

[341] Scholars overwhelmingly take the position that while the U.S. need not recognize foreign adoptions that violate the strong public policy of the state, the U.S. Constitution requires state courts to recognize adoption decrees issued by sister states. *See* LUTHER L. MCDOUGAL, III ET AL., AMERICAN CONFLICTS LAW 786–89 (5th ed. 2001); EUGENE F. SCOLES ET AL., CONFLICT OF LAWS 703–04 (4th ed. 2000); Herma Hill Kay, *Adoption in the Conflict of Laws: The UAA, Not the UCCJA, Is the Answer*, 84 CAL. L. REV. 703, 714 (1996); Barbara J. Cox, *Adoptions by Lesbian and Gay Parents Must Be Recognized by Sister States Under the Full Faith and Credit Clause Despite Anti-Marriage Statutes That Discriminate Against Same-Sex Couples*, 31 CAP. U. L. REV. 751, 761–62 (2003); Ralph U. Whitten, *Choice of Law, Jurisdiction, and Judgment Issues in Interstate Adoption Cases*, 31 CAP. U. L. REV. 803, 849 (2003) (concluding that adoptions must clearly be recognized in

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marriages, involve court orders. Moreover, while adoptions are not ordinarily contested proceedings, the presence of the state involves an independent party charged with the responsibility of conducting an investigation to protect the child.[342] Adoptions should, at the least, establish parental status absent an action to invalidate the original adoption. In *Russell v. Bridgens*,[343] for example, which appears to be the first state supreme court decision to address interstate recognition of same-sex adoption decrees, the Supreme Court of Nebraska held that the Nebraska courts must recognize a Pennsylvania adoption, absent a successful collateral attack on the Pennsylvania decree.[344]

The question of whether adoption then becomes the institution of choice for the recognition of alternative families may depend on the ways in which the cases arise. The most recent front in the culture wars has been legislative action or referendums that seek statewide restrictions on such adoptions.[345] These efforts are largely symbolic, because gays and lesbians overwhelmingly adopt either hard to place foster children or their partners' biological children.[346] Nonetheless, such broad anti-gay statements, like the debate over same-sex marriage, could serve to mobilize conservative constituencies. Interstate recognition of adoption, in contrast, involves case-by-case judicial decisions.[347] And when test cases brought by intact families frame the issues, even conservative courts have been willing to rule in favor of the adoptions.

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other states, but also maintaining that Congress could change that result without a constitutional amendment).

[342] Home studies, however, would most likely not be required in step-parent adoptions where a legal parent consents to an adoption by her spouse.

[343] 647 N.W.2d 56 (Neb. 2002).

[344] *Id.* at 59.

[345] The Arkansas Supreme Court and the Missouri Attorney General, however, have refused to enforce such bans. *See* Dep't of Human Servs. and Child Welfare Agency Review Bd. v. Howard, No. 05-814, 2006 WL 1779467 (Ark. June 29, 2006) (overturning a regulatory ban on gay and lesbian foster parents on the ground that there is no relationship between a blanket ban on homosexual foster parents and the health, safety, and welfare of foster children); Tim Hoover, *Decision Clears Lesbian's Path to Foster Parenthood*, KANSAS CITY STAR, June 8, 2006, at A1.

[346] *See* EVAN B. DONALDSON ADOPTION INSTITUTE, ADOPTION BY LESBIANS AND GAYS: A NATIONAL SURVEY OF ADOPTION AGENCY POLICIES, PRACTICES, AND ATTITUDES 3 (2003), http://www.adoptioninstitute.org/whowe/Lesbian%20and%20Gay%20Adoption%20Report_final.doc (finding that special needs adoption agencies were most likely to accept applications from gays and lesbians); Jane S. Schacter, *Sexual Orientation, Social Change, and the Courts*, 54 DRAKE L. REV. 861, 875–76 (2006) (finding that second-parent adoptions by homosexuals have become accepted).

[347] Russell v. Bridgens, 647 N.W.2d 56, 59 (Neb. 2002).

The Virginia case of *Davenport v. Little-Bowser*,[348] for example, is in many ways opposite to *Miller-Jenkins*. *Davenport* involved four children in three different families, each born in Virginia, lawfully adopted by same-sex partners in other states, and all of whom resided outside of the jurisdiction at the time of the case.[349] The partners sought issuance of new birth certificates in Virginia that would recognize the adoption and the parental status of both partners, but the registrar of births refused, often issuing a new birth certificate that recognized termination of the parental rights of a consenting biological parent, but not the same-sex partner added through adoption.[350] The Virginia Supreme Court deferred discussion of the Full Faith and Credit issues, but construed Virginia law to compel issuance of the birth certificates in accordance with the out-of-state adoptions.[351] The case presented a relatively easier decision than *Miller-Jenkins* because it involved intact families and a ministerial issue. Moreover, the case addressed construction of the Virginia statute governing adoptions and birth-certificates, not same-sex marriage or the status of adult relationships.

Nonetheless, the courts will ultimately have to face the Full Faith and Credit issue directly. The most promising cases may be those like the Virginia litigation that are brought by intact families. In Oklahoma, for example, another test case challenged the validity of a 2004 amendment to the state adoption code, which explicitly barred recognition of "more than one individual of the same sex from any other state or foreign jurisdiction."[352] Some of the plaintiffs, like those in the Virginia litigation, sought to compel issuance of Oklahoma birth certificates recognizing out-of-state adoptions.[353] The trial court invalidated the statute as a violation of the Full Faith and Credit Clause, concluding that so long as the validity of the decree had not been challenged, adoptions were court orders entitled

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[348] 611 S.E.2d 366 (Va. 2005).

[349] *Id.* at 367. The case involved a total of four children and three adoptive parents. *Id.*

[350] *Id.*

[351] *Id.* at 372.

[352] Finstuen v. Edmondson, No. CIV-04-1152-C, 2006 U.S. Dist. LEXIS 32122, at *2 (W.D. Okla. May 19, 2006) (citing OKLA. STAT. tit. 10, § 7502-1.4(A) (Supp. 2006)). The legislature passed the amendment to circumvent an attorney general's opinion that the state was required by the Full Faith and Credit Clause to recognize out-of-state adoptions. *See* Chen, *supra* note 330, at 187–88.

[353] *Finstuen*, 2006 U.S. Dist. LEXIS 32122, at *4–6. Other plaintiffs, who had Oklahoma birth certificates listing both fathers as parents, were held not to have standing because they lacked "injury in fact," as the amendment only affected documents issued by other states and their fear that the birth certificate would not be recognized should they ever need to show it in Oklahoma was purely speculative. *Id.* at *13–14.

to enforcement.[354] An appeal is pending. Moreover, in the one state supreme court case to address interstate recognition in the context of a contested custody fight, the Nebraska Supreme Court issued a unanimous decision that recognized a Pennsylvania adoption by a lesbian couple.[355] The lower court concluded that the Pennsylvania court erred in permitting adoption by a second mother without termination of the parental rights of the first, and therefore had no jurisdiction to issue the decree.[356] The Nebraska high court, however, ruled that Pennsylvania courts had the power to construe Pennsylvania adoption law, and that the Nebraska courts were bound by their determination absent a collateral attack on the decree.[357]

Interstate recognition of adoption is likely to track the cases involving interstate recognition of divorce during the era when many states restricted access, and resort to foreign—or Nevada—divorces became the way around inconvenient state statutes. A twin set of Supreme Court cases established the ground rules for the disputes. In the first *Williams* case,[358] the Court held that the North Carolina courts were required under the U.S. Constitution's Full Faith and Credit Clause to recognize Nevada divorces, even though the terms on which they were granted violated the public policy of the state.[359] Three years later, in the second *Williams* case,[360] North Carolina attacked the Nevada judgment on the grounds that the parties had not adequately established residence in Las Vegas, and the Nevada courts therefore lacked jurisdiction to issue the divorce.[361] This time the Supreme Court agreed.[362]

The Nebraska, Oklahoma, and Virginia adoption cases lie within this framework. The courts have clearly rejected wholesale refusals to recognize adoptions in other states, and scholars agree that the public policy exception, which permits states to deny recognition of same-sex marriage or foreign adoptions, does not apply to adoption decrees from sister states.[363] This leaves open the possibility of collateral attacks, one

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[354] *Id.* at *47; *see also* Spector, *supra* note 324 (discussing the impact of the Full Faith and Credit Clause on adoption orders).
[355] Russell v. Bridgens, 647 N.W.2d 56, 58 (Neb. 2002).
[356] *Id.* at 58–59.
[357] *Id.* at 59.
[358] Williams v. North Carolina, 317 U.S. 287 (1942).
[359] *Id.* at 303.
[360] Williams v. North Carolina, 325 U.S. 226 (1945).
[361] *Id.* at 235–36.
[362] *Id.* at 239.
[363] *See* Whitten, *supra* note 341.

case at a time, on the validity of contested judgments.[364] In the meantime, intact families may secure recognition as they cross state lines, subject to the possibility that cause organizations may fund the opposition (and hoping that countervailing cause organizations will contribute to their defense) if a dispute arises.

Even though it is difficult to predict how—or whether—the Supreme Court will ultimately resolve these issues, adoption offers the best hope for securing interstate recognition of the partners engaged in parenting within the new zone of privacy made possible by assisted reproduction. As *Miller-Jenkins* illustrates, reliance on parental presumptions in the context of same-sex marriage, civil unions, or domestic partnerships is risky across jurisdictions because affirmation of parental standing requires acknowledgment of the adult partnership. Adoption, in contrast, rests on the parent-child tie and on a final judgment by a sister state.[365] The clash in values is less direct, and the underlying constitutional framework provides a stronger basis for recognition.

CONCLUSION

As assisted reproduction has won greater acceptance, recognition of the intended parents has gradually been folded into the fabric of more general family law principles. Those principles have historically tied recognition of adult partners to marriage; indeed, hundreds of years of family law decisions provide recognition for marital partners who may not have fathered the children they raised.

Today, the issue is not so much recognition of the children of assisted reproduction, but recognition of the families of choice that assisted reproduction facilitates. In asking what role adoption is likely to play as an *institution*, it is critical to identify where the needs of prospective parents overlap with the interests of the state. At a time when the states are deeply divided in their response to unmarried (and particularly same-sex) couples,[366] adoption provides a more neutral institution that may broker state recognition of parenthood while keeping partnership out of the public sphere.

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[364] For a summary of the types of arguments that may be mounted, see Wardle, *supra* note 12, at 578–92.

[365] *See* Cox, *supra* note 341, at 779.

[366] For a list of states that support and prohibit adoption by unmarried couples, see W. Bradford Wilcox & Robin Fretwell Wilson, *Bringing Up Baby: Adoption, Marriage, and the Best Interests of the Child*, 14 WM. & MARY BILL RTS. J. 883, 888–89 & nn.29–30 (2006).

An intriguing question is whether these developments may also overtime remake adoption itself. Marriage, as an institution, carries enormous emotional power because of its connection with ritual, history, and a public ceremony that ties private relationships to community norms. Civil unions and domestic partnerships carry little such emotional weight. Adoption, in contrast, provides a formal institution with established meaning—the connection of adult to child—that mediates the legal relationships formed around an intrinsically emotion-laden event—the birth of a child and the forging of parent-child bonds.

If marriage—and the related institutions of civil unions and domestic partnerships—remain contested turf, adoption may emerge, not as a comprehensive response to parentage in the context of assisted reproduction, but as the institution that unites public recognition with private commitment in the context of families of choice.